TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 431.

THE UNION BRIDGE COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 3, 1906.

(20,396.)

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1 *Blank—General Order.*

RULE 14 (*d*). All papers must be so endorsed as to disclose the general contents thereof; and all orders, decrees and rules to show cause submitted to the court by counsel must be prepared so that when served they will of themselves be self-explanatory.

In the District Court of the United States for the Western District of Pennsylvania.

No. 1, Oct. T., 1905.

THE UNITED STATES OF AMERICA
vs.
THE UNION BRIDGE CO.

And now to wit this 27th day of September 1906 upon motion—counsel for defendant & good cause shown it is ordered that the time for filing the record herein in the Supreme Court of the United States be & the same is hereby extended to the first day of October 1906.

JOS. BUFFINGTON,
Trial Judge.

2 [Endorsed:] No. 1, Oct. T. 1905 (Criminal Docket) United States District Court, Western District of Pennsylvania. United States *vs.* Union Bridge Co. Rule 14 requires indorsement of all papers. Order extending time for filing record. Filed Sept. 27, 1906.

3 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, Oct. Term, 1905, Criminal Doc.

THE UNITED STATES
vs.
THE UNION BRIDGE CO.

And now, to wit, this 23rd day of July, 1906, comes the defendant in the above-entitled cause, by its counsel, W. B. Rodgers and Johns McCleave, and upon motion and for good cause shown, it is hereby ordered that the time for filing the record in the above-entitled cause in the Supreme Court of the United States be and the same hereby is extended for the period of ten days from this date.

JOS. BUFFINGTON, *Judge.*

4 [Endorsed:] No. 1, Oct. Term, 1905. Criminal Docket. In the District Court of the United States for the Western District of Pennsylvania. The United States *vs.* The Union Bridge Company. Order extending time for filing record in Supreme Court of U. S. M. D. Filed July 23, 1906.

5 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

UNITED STATES
vs.
UNION BRIDGE COMPANY.

And now, to-wit, July 7th, 1906, on motion of Johns McCleave, of counsel for the said defendant, and for good cause shown, the time for the filing of the transcript of the record sur appeal in the said case in the Supreme Court of the United States, is enlarged and extended for ten days from this date.

Per Curiam.

6 [Endorsed:] U. S. District Court, West. Dist. of Penna. No. 1, October Term, 1905. Criminal Docket. United States *vs.* Union Bridge Company. Order extending time for filing record in United States Supreme Court. M. D. Filed July 7, 1906.

7 In the District Court of the United States for the West. District of Pennsylvania.

THE UNITED STATES
vs.
UNION BRIDGE CO.

And now, to wit, this 12 day of May 1906, on motion of W. B. Rodgers and Johns McCleave, counsel for defendant & for good cause shown the time for filing of the transcript of the record *sur* appeal in said case in the Supreme Court of the United States is enlarged and extended for sixty days from the date hereof.

Per Curiam.

JOS. BUFFINGTON, *Judge.*

8 [Endorsed:] No. 1, Oct. T. 1905. Criminal Docket. United States *vs.* Union Bridge Co. Order extending time for filing transcript. M. D. Filed May 12, 1906.

9 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
v.
THE UNION BRIDGE COMPANY.

We, the undersigned, do hereby acknowledge ourselves indebted to the United States of America in the penal sum of Five thousand dollars, lawful money of the United States, to be levied of our goods and chattels, lands and tenements, to the use of the said United States, and to which payment well and truly to be made, we and each of us do bind ourselves, our heirs, executors, and administrators, and each and every of them, jointly and severally, firmly by these presents.

Dated at Pittsburgh this 21st day of April A. D. 1906.

Now, the condition of this obligation is such that if the Union Bridge Company, which has been convicted under an indictment charging it with a misdemeanor, shall be and appear at a term of the district court of the United States for the western district of Pennsylvania, to be holden at Pittsburgh, when called upon to appear, and not depart the court without leave, then this obligation to be void; otherwise to remain in full force and virtue.

[Seal Union Bridge Company, Pittsburgh, Pa.]

UNION BRIDGE CO.
WM. V. CALLEY, *Pres.*
WM. V. CALLEY.

Attest:
JOS. FORD, *Sec'y.*

Taken and acknowledged in open court this 21st day of April, A. D. 1906.

WM. T. LINDSEY, *Clerk.*

10 [Endorsed:] U. S. District Court, Western District of Penna. No. 1 October Term 1905. Criminal Docket. United States *vs.* The Union Bridge Co. D. Bond. And now Apr. 21, 1906, approved. *Per Curiam.* Filed April 21, 1906.

11 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
v.
THE UNION BRIDGE COMPANY.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

To Hon. John W. Dunkle, District Attorney of the United States for the Western District of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States district court, wherein The Union Bridge Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 11 day of April, A. D. 1906.

JOS. BUFFINGTON, *Judge.*

April 11", 1906, service accepted.

JOHN W. DUNKLE,
U. S. Attorney.

12 [Endorsed:] No. 1, October Term, 1905. Criminal Docket. United States *vs.* The Union Bridge Co. Citation. D. Filed April 12, 1906.

13 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
v.
THE UNION BRIDGE COMPANY.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States district court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before

you, between The United States and The Union Bridge Company, a manifest error hath happened, to the great damage of the said Union Bridge Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and — held that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to
14 the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this — day of April A. D. 1906.

[Seal of U. S. District Court, W. D. Pennsylvania.]

WM. T. LINDSEY, *Clerk.*

Allowed by—
JOS. BUFFINGTON, *Judge.*

15 [Endorsed:] United States District Court, Western District of Pennsylvania. No. 1, October Term, 1905. Criminal Docket. United States of America *vs.* The Union Bridge Co. Writ of Error. D. Filed April 12, 1906.

16 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
v.
THE UNION BRIDGE COMPANY.

Petition for Writ of Error.

To the Honorable Joseph Buffington, United States District Judge for the Wetsern District of Pennsylvania:

The petition of the Union Bridge Company, the above named defendant, by its attorneys, W. B. Rodgers and Johns McCleave, respectfully represents:

That upon the 20th day of February 1906, the said defendant in pursuance to a verdict of guilty against it found in your Honorable Court upon the 11th day of January in the year 1906, of a misdemeanor, more particularly against it charged and set forth in the indictment shown herein, was sentenced by your Honorable Court to pay a fine to the United States of $5,000, to pay the costs of the

prosecution and stand committed until the sentence so imposed shall be complied with.

The said defendant is advised by counsel that in the trial upon the said indictment it was aggrieved by various errors in law then made by the said Court, which errors are particularly specified and set forth in its assignment of errors herewith presented and filed. Your petitioner is desirous of having the said errors reviewed by the Supreme Court of the United States, and to such end humbly
17 prays your Honor to grant it leave to have issued in said cause a writ of error, removing the said record herein to the Supreme Court of the United States. And it will ever pray, etc.

W. B. RODGERS,
JOHNS McCLEAVE,
Att'ys for Union Bridge Co.

And now, April 11, 1906, the writ of error allowed as prayed, and the defendant is ordered to give bail during the pendency of the cause in the sum of $5,000. And it is further ordered that the said writ be a supersedeas of any execution upon the judgment herein, pending these proceedings.

JOS. BUFFINGTON, *Judge.*

18 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
v.
THE UNION BRIDGE COMPANY.

Assignments of Error.

First. The court erred in its answer to the first point presented on behalf of the defendant, which point and answer are as follows:

"First. That in the absence of any legislation by the Congress of the United States, assuming jurisdiction over the Allegheny River, the power of the State of Pennsylvania to authorize the construction of any bridges that it might see fit, including the Union Bridge over the Allegheny River, was plenary, and if such erection was made under and by the state authority, the bridge is a lawful structure and the private property of the Bridge Company." Answer "refused."

Second. The court erred in its answer to the second point presented upon behalf of the defendant, which point and answer are as follows:

"Second. The attempt in the present proceedings, upon the part of the United States, to compel the reconstruction or removal of the United Bridge, erected under the authority of the State of Pennsyl-

vania, is only referable to the 18th Section of the River and
19 Harbor Bill of the Congress of the United States, approved March 3rd, 1899." Answer "refused."

Third. The court erred in its answer to the third point presented upon behalf of the defendant, which point and answer are as follows:

"Third. The said 18th Section of the River and Harbor Bill of the Congress of the United States, approved March 3rd, 1899, is null and void for the following reasons:

"(*a*) The said act attempts to take and destroy the private property of the Union Bridge Company without due process of law.

"(*b*) The said act undertakes to authorize the taking of private property for public use without just compensation.

"(*c*) In and by the terms of the said act it is undertaken by the Congress of the United States to unlawfully delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army both legislative and judicial powers, in contravention of the Constitution of the United States." Answer "refused."

Fourth. The court erred in its answer to the fourth point presented upon behalf of the defendant, which point and answer are as follows:

"Fourth. The Union Bridge having been erected across the Allegheny River prior to the enactment of any legislation of the Congress of the United States assuming jurisdiction over the said river, and having, as erected, been maintained and used by the said
20 Bridge Company and the public at large with the consent and acquiescence of the State of Pennsylvania and without interference or complaint of any of the authorities of the United States until the beginning of these proceedings, the said bridge is a lawful structure and cannot be taken by the United States, either by way of requiring a reconstruction of the same or removal of the said bridge, without making just compensation to the Union Bridge Company therefor." Answer "refused."

Fifth. The court erred in its answer to the fifth point presented upon behalf of the defendant, which point and answer are as follows:

"Fifth. The said Act of Congress makes it the duty of the said Secretary of War, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge, to-wit, the bridge complained against, so to alter the same as to render navigation through or under it reasonably free and unobstructed, and in giving such notice he shall specify the changes to be made and shall prescribe in each case a reasonable time in which to make them. Under this, the Secretary of War was required affirmatively by the act to give to the Union Bridge Company, owning the bridge in controversy in this case, an opportunity to be heard by him, the said Secretary of War, before he was authorized or lawfully empowered to give the notice to the said Company to so alter the bridge in requirement with his order, and it appearing affirmatively in the case that the said Elihu Root,
21 the Secretary of War, in making the order set forth in the Information, never at any time gave the Union Bridge Com-

pany reasonable opportunity to be heard before him, or any hearing whatsoever. The order set forth in the information, given and signed by the said Elihu Root, then the Secretary of War, is not a lawful order and is null and void and not authorized by the said act." Answer "refused."

Sixth. The court erred in its answer to the first point put upon the part of the United States, which point and answer are as follows:

"First. By Section 18 of the Act of March 3, 1899, (30 St. 1153), Congress placed upon the Secretary of War the duty of determining whether or not bridges over navigable waterways of the United States were obstructive to the navigation of such waterways. In case he complies with the requirements of the law in regard to a hearing, and fixes a reasonable time for the completion of the prescribed alterations, his notice to alter the Union Bridge, set forth in the Information, was a lawful notice, and the failure to alter said bridge in accordance with said order, or to remove the said structure, if continued during the month of July A. D. 1905, constituted the misdemeanor charged in the Information; and though the defendant originally built said Union Bridge under color of authority of an Act of Assembly of the State of Pennsylvania, and even though the requirements of that Act of Assembly were strictly observed by said Union Bridge Company in constructing said Bridge, such Act of Assembly would not constitute a valid defense to the Information." Answer "affirmed."

22 *Seventh.* The court erred in its answer to the second point put upon behalf of the United States:

"2. The cost of making the alterations prescribed by the Secretary of War in his notice to the Union Bridge Company, set forth in the Information and offered in evidence, or the cost of the removal of the Union Bridge, is not a defense to the charge of failing to obey such order, in the absence of testimony showing the removal of the bridge, or the inability of the Union Bridge Company to remove it within the period fixed by the said notice." Answer "affirmed."

Eighth. The court erred in its answer to the third point put upon behalf of the United States:

"3. Section 18 of the Act of March 3, 1899, directs the Secretary of War to give the parties in interest, to-wit, the bridge owners, a reasonable opportunity to be heard, prior to issuing a final notice to said bridge owners, to make the alterations deemed necessary by him in order to render the bridge under consideration not an obstruction to the free navigation of the river spanned by it. Such hearing need not be held by the Secretary of War in person; and it is sufficient under the provisions of the Act if the Secretary of War has given said owners an opportunity to be heard relative to the proposed alterations, before one or more of his agents or subordinates, and the testimony or statements made at said hearing have been transmitted and considered by said Secretary of War." Answer "affirmed."

23 *Ninth.* The court below erred in that portion of its charge to the Jury as follows:

"The Union Bridge Company is a corporation of the State of Pennsylvania. It built this bridge over the Allegheny River in pursuance of the powers conferred upon it by its charter granted by the state. The Secretary of War, in pursuance of the powers vested in him by an Act of Congress, has notified the Bridge Company, after hearing the parties, that this bridge is an obstruction to navigation and has ordered to have it altered so as to avoid its being an obstruction to navigation. On the part of the Government it is contended that this is a lawful order of the Secretary of War, and for present purposes we instruct you that it is."

Tenth. The court below erred in that portion of its charge to the Jury which reads as follows:

"This is a proceeding by the United States against the Union Bridge Company in the nature of a criminal information, for failure to alter a bridge which is an alleged obstruction to navigation. On the trial thereof, no issues of fact were raised."

Eleventh. The court below erred in that portion of its charge to the Jury which reads as follows:

24 "The Allegheny River rises in Pennsylvania, flows North into New York State and thence back into Pennsylvania. The latter state, by Act of March 21st, 1798, enacted the Allegheny, from the New York State line to its mouth, a navigable stream; and the State of New York, by Act of March 31st, 1807, did likewise in its Counties of Genesee and Alleghany."

Twelfth. The Court below erred in that portion of its charge to the Jury which reads as follows:

"The Allegheny is the principal branch of the Ohio, its volume being six times greater than that of the Monongahela. It is included in the general plan for the improvement by the National Government of local interstate water ways and the harbor of Pittsburgh."

Thirteenth. The court below erred in that portion of its charge to the Jury which reads as follows:

"The Union Bridge is a pier-supported, wooden Structure; it crosses from Pittsburgh to Allegheny City, and is the first bridge on the Allegheny. It was built in 1874-1875 by the Union Bridge Company, a corporation chartered by the State of Pennsylvania, March 13, 1873, and was opened for travel July, 1875."

25 *Fourteenth.* The court below erred in that portion of its charge to the jury which reads as follows:

"By the Act of April 30th, 1824, Congress inaugurated the system under which the appropriations were annually made providing for surveys and the reports thereof to Congress during the period later referred to herein, viz., from 1828 to 1838. * * * By virtue of this Act Congress, by resolution of December 9, 1828, authorized the examination of 'the Allegheny river from the City of Pittsburg to the mouth of French Creek, at Franklin, with a view to slackwater navigation.' Such survey, a distance of one hundred and twenty-one miles, was made by the War Department and the report thereto made, which survey and report were on June 8, 1832, reported to Congress and form H. R. Document No. 265 of the first session of

the Twenty-second Congress. This report showed the river could be made navigable to Franklin for a four and a half foot stage, all the year round, by a slackwater system, for 85-ton boats, which the report states was the type in use on the Ohio. By H. R. Document No. 343, second session of the Twenty-fifth Congress, it appears that another survey was made in 1836-1837, in pursuance of a resolution of Congress, and the same was reported to that body on March 23, 1838. * * * An examination of the War Department engineers shows that this survey was made in pursuance of a plan
26 to connect the great river system of the West and South-west with the New York State canals then building. In that report the present navigation of the Allegheny was illustrated by the draft and capacity of the steamboat New Castle, then engaged in that river trade. * * * It will thus be seen that in this project, which had in view connecting the canal system of New York State with the entire river systems of the West and Southwest, the Allegheny river was an important interstate link. * * * The report shows that the notes, maps, profiles and plans of this work were burned and no steps were taken toward slackwatering the stream until shortly after the Union Bridge was built; but this early work by Congress evidences an assumption by the National Government, at least to the extent of survey and examination, of jurisdiction over the Allegheny as a proper subject of interstate navigation improvement."

Fifteenth. The court below erred in that portion of its charge which reads as follows:

"It will also be noted that the use of the Allegheny was included by the Government in its plans for the creation of a deep water harbor for Pittsburg. This is fully set forth in the report of Major Merrill of December 2, 1874, found in Chief of Engineers'
27 report of 1875, Volume 2, page 687."

Sixteenth. The court below erred in that portion of its charge to the jury which reads as follows:

"In view of the public interest and agitation over this proposed improvement the fact that the Allegheny was to be used as part of the harbor, the deterrent effect of the public notice by the engineer in charge, referred to hereafter in Judge Taft's opinion, that this bridge would obstruct navigation, becomes more significant."

Seventeenth. The court below erred in that portion of its charge to the jury which reads as follows:

"The bridge company took no steps to alter, change or remove the bridge and in this shape the matter rested until July 23, 1904, three days before the expiration of the eighteen months' time provided in the notice, when its counsel presented a petition to the then Secretary of War, Judge Taft, describing itself therein as the Union Bridge Company, 'owning and operating the Union Bridge, over the Allegheny River at Pittsburg, Pa., under and by virtue of the authority of the United States Government, setting forth the making of the order to alter, that it would expire July 26, 1904, and
28 praying such time be extended and a day fixed to present reasons for a re-hearing.

"In pursuance of this petition, the Secretary of War, having temporarily suspended from time to time the order to alter the bridge, heard the arguments of counsel for the bridge company and thereafter, on July 21, 1905, delivered an opinion as follows:

"'The Union Bridge is an unreasonable obstruction to commerce of the Allegheny river. If the bridge were not there, the winter refuge which the stretch of the Allegheny river up to the new bridge would offer for the fleet of boats, which usually are moored in the Monongahela, would be a very great advantage for the navigation and commerce on the Ohio River and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in different sections of the country, have their ice-breaks at different times in the early spring. The mouth of one offers very desirable refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The Union bridge at the mouth of the Allegheny was erected at a time when the Secretary of War was not given specific control over navigable streams, and was not authorized to inhibit the construction of bridges which are likely to obstruct navigation, but it appears that an army engineer, Colonel Merrill, in charge of the district, publicly announced that
29 this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the Government. These are the facts that I find independently of any previous adjudication; but added to this, is the finding of my predecessor, Mr. Root, to exactly the same effect, upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before me on a petition for rehearing of Mr. Root's order. As an original question I should have ruled as Mr. Root rules, and *a fortiorari*, because the orders of this department are not to be lightly set aside, and are not to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake. The petition for rehearing is denied, and the order suspending the operation of Mr. Root's order is not revoked. The order will be put in force and executed by the proper officers, and the Union bridge will be notified accordingly.'"

30 *Eighteenth.* The Court below erred in that portion of its charge to the jury which reads as follows:

"From these recited facts it is clear that the bridge company had notice of the hearing, that it duly appeared, that on hearing and rehearing its rights were considered and that in pursuance of due action by the Secretary of War taken in the premises it has been determined that the bridge is an unreasonable obstruction to navigation."

Nineteenth. The court below erred in that portion of its charge to the jury which reads as follows:

"By this general act Congress itself enacted what should be done when an obstruction existed, and all the power conferred on the Secretary of War was to determine when the law should be enforced, and that this authority should not be abused, a party considering

himself aggrieved is by the act given a direct appeal to the court of highest resort. That administrative duties in carrying out legislative powers may be delegated to departments has been held in many cases."

Twentieth. The court below erred in that portion of its charge to the jury which reads as follows:

"That the bridge is an obstruction to navigation is now settled, and is not now open to question; indeed, no question in that regard has ever been raised in the whole proceeding, either on the
31 hearing in pursuance of the statute or on the criminal proceedings in this court. It therefore having been legally determined that the bridge company maintains an obstruction to navigation and so fails to 'meet the requisitions of the law in regard to the obstructions of navigation,' it can claim no immunity or protection from the State of Pennsylvania, whose charter required that its bridge 'shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation.'"

Twenty-first. The court below erred in that portion of its charge to the jury which reads as follows:

"In this connection it should be noted that the financial loss sustained by this company is not in point of fact of the serious character that would at first sight appear. It has a wooden bridge come 30 years old. In the natural life of such a structure it would not have been long, were the Government taking no steps, before the company would have to replace it and expend a large sum of money in so doing. It will thus be seen that the actual loss to the company is not the cost of erecting a new and modern bridge, but simply the profit arising from tolls during the life of its present structure."

Twenty-second. The court below erred in that portion of its charge to the jury which reads as follows:

"Moreover, the case does not fall within the literal terms
32 of the constitutional provision in that no private 'property (is) taken for public use.' * * * Indeed, the right of the bridge company to maintain a bridge and to collect tolls thereon is not denied, much less taken, and the effect of this proceeding is not to take or condemn its property, but is simply to compel the company to so use its property as not to interfere with the right of the public to an unobstructed use of the stream."

Twenty-third. The court below erred in that portion of its charge to the jury which reads as follows:

"But waiving its charter conditions and the duty this bridge company owes to the State of Pennsylvania, under which alone it justifies the maintenance of this obstruction, we think the paramount right of Congress to require the alteration, without compensation, of any bridge obstructing navigable interstate waters is, under the decisions of the Supreme Court, clear."

Twenty-fourth. The court below erred in that portion of its charge to the jury which reads as follows:

"Under these authorities we are of opinion that Congress was

acting within its constitutional limits in enacting that bridges, whenever they obstructed navigation, should be removed, and that without compensation made to the obstructor."

33 *Twenty-fifth.* The court below erred in that portion of its charge to the jury which reads as follows:

"Holding then, as we do, that this law is constitutional, the proceedings under it regular and the verdict of the jury warranted, we dismiss the motion in arrest of judgment and grant the motion of the Government to impose sentence."

W. B. RODGERS,
JOHNS McCLEAVE,
Att'ys for Union Bridge Co.

34 [Endorsed:] No. 1 October Term, 1905. Criminal Docket. The United States of America, *v.* The Union Bridge Company. Petition for Writ of Error, and Assignments of Error, and order allowing same. D. W. B. Rodgers, Johns McCleave, Att'ys for Defendant. Filed: April 12, 1906.

35 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905, Criminal Docket.

THE UNITED STATES
vs.
THE UNION BRIDGE COMPANY.

And now, to wit, February 20 A. D. 1906, "the sentence of the Court is, that you The Union Bridge Company pay a fine to the United States of Five Thousand Dollars; that you pay the costs of this prosecution, and stand committed until this sentence be complied with."

Per Curiam.

36 [Endorsed:] No. 1, October Term, 1905 (Criminal Docket). United States District Court, Western District of Pennsylvania. The United States *vs.* Union Bridge Company. D. Sentence of the Court. Filed Feb. 20, 1906.

37 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

UNITED STATES
v.
UNION BRIDGE COMPANY.

The defendant, by its counsel, excepts to those portions of the charge of the Court hereinafter specified as follows:

First. "This is a proceeding by the United States against the Union Bridge Company, in the nature of a criminal information, for failure to alter a bridge which is an alleged obstruction to navigation. On the trial thereof, no issues of fact were raised."

Second. "The Allegheny River rises in Pennsylvania, flows north into New York State and thence back into Pennsylvania. The latter state, by Act of March 21st, 1798, enacted the Allegheny, from the New York State line to its mouth, a navigable stream; and the State of New York, by Act of March 31st, 1807, did likewise in its Counties of Genesee and Allegany.

Third. "The Allegheny is the principal branch of the Ohio, its volume being six times greater than that of the Monongahela. It is included in the general plan for the improvement by the National Government of local interstate water ways and the harbor of Pittsburg."

38 *Fourth.* "The Union Bridge is a pier-supported, wooden structure; it crosses from Pittsburgh to Allegheny City, and is the first bridge on the Allegheny. It was built in 1874–1875 by the Union Bridge Company, a corporation chartered by the State of Pennsylvania, March 13, 1873, and was opened for travel July, 1875."

Fifth. "By the act of April 30, 1824, Congress inaugurated the system under which the appropriations were annually made providing for surveys and the report thereof to Congress during the period later referred to herein, viz., from 1828 to 1838. * * * By virtue of this act Congress by resolution of December 9, 1828, authorized the examination of 'the Allegheny river from the city of Pittsburg to the mouth of French Creek, at Franklin, with a view to slackwater navigation.' Such survey, a distance of one hundred and twenty-one miles, was made by the War Department and the report thereto made, which survey and report were on June 8, 1832, reported to Congress and form H. R. Document No. 265 of the first session of the Twenty-second Congress. This report showed the river could be made navigable to Franklin for a four and a half foot stage, all the year round, by a slackwater system, for 85-ton boats, which the report states was the type in use on the Ohio. By H. R. Document No. 343, second session of the Twenty-fifth Congress, it appears that another survey was made in 1836–1837, in pursuance of a resolution of Congress, and the same was reported to that body on March 23, 1838. * * * An examination of the War Department engineers shows that this survey was made in pursuance of a plan to connect the great river system of the West and Southwest with the New York state canals then building. In that

39 report the present navigation of the Allegheny was illustrated by the draft and capacity of the steamboat New Castle, then engaged in that river trade. * * * It will thus be seen that in this project, which had in view connecting the canal system of New York State with the entire river systems of the West and Southwest, the Allegheny river was an important interstate link. * * * The report shows that the notes, maps, profiles and plans of this work were burned and no steps were taken toward slackwatering the stream

until shortly after the Union Bridge was built; but this early work by Congress evidences an assumption by the National Government, at least to the extent of survey and examination, of jurisdiction over the Allegheny as a proper subject of interstate navogation improvement."

Sixth. "It will also be noted that the use of the Allegheny was included by the Government in its plans for the creation of a deep water harbor for Pittsburg. This is fully set forth in the report of Major Merrill of December 2, 1874, found in Chief of Engineers' report of 1875, volume 2, page 687."

Seventh. "In view of the public interest and agitation over this proposed improvement the fact that the Allegheny was to be used as part of the harbor, the deterrent effect of the public notice by the engineer in charge, referred to hereafter in Judge Taft's opinion, that this bridge would obstruct navigation, becomes more significant."

Eighth. "The bridge company took no steps to alter, change or remove the bridge and in this shape the matter rested until
40 July 23, 1904, three days before the expiration of the eighteen months' time provided in the notice, when its counsel presented a petition to the then Secretary of War, Judge Taft, describing itself therein as the Union Bridge Company, 'owning and operating the Union Bridge, over the Allegheny River at Pittsburg, Pa., under and by virtue of the authority of the United States Government,' setting forth the making of the order to alter, that it would expire July 26, 1904, and praying such time be extended and a day fixed to present reasons for a rehearing.

"In pursuance of this petition, the Secretary of War, having temporarily suspended from time to time the order to alter the bridge, heard the arguments of counsel for the bridge company and thereafter, on July 21, 1905, delivered an opinion as follows:

'The Union bridge is an unreasonable obstruction to commerce of the Allegheny river. If the bridge were not there, the winter refuge which the stretch of the Allegheny river up to the new bridge would offer for the fleet of boats, which usually are moored in the Monongahela, would be a very great advantage for the navigation and commerce on the Ohio river and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in different sections of the country, have their ice-breaks at different times in the early spring. The mouth of one offers very desirable refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The Union bridge at the mouth of the Allegheny was erected at a time when the Secretary of War was not given specific control over navigable streams, and was not authorized
41 to inhibit the construction of bridges which are likely to obstruct navigation, but it appears that an army engineer, Colonel Merrill, in charge of the district, publicly announced that this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the Government. These are the facts that I find independently of any previous adjudication; but added to this, is the finding of my predecessor,

Mr. Root, to exactly the same effect, upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before me on a petition for rehearing of Mr. Root's order. As an original question I should have ruled as Mr. Root ruled, and *a fortiori*, because the orders of this department are not to be lightly set aside, and are not to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake. The petition for rehearing is denied, and the order suspending the operation of Mr. Root's order is not revoked. The order will be put in force and executed by the proper officers, and the Union bridge will be notified accordingly.'"

Ninth. "From these recited facts it is clear that the bridge company had notice of the hearing, that it duly appeared, that on hearing and rehearing its rights were considered and that in pursuance of due action by the Secretary of War taken in the premises it has been determined that the bridge is an unreasonable obstruction to navigation."

42 *Tenth.* "By this general act Congress itself enacted what should be done when an obstruction existed, and all the power conferred on the Secretary of War was to determine when the law should be enforced, and that this authority should not be abused, a party considering himself aggrieved is by the act given a direct appeal to the court of highest resort. That administrative duties in carrying out legislative powers may be delegated to departments has been held in many cases."

Eleventh. "That the bridge is an obstruction to navigation is now settled, and is not now open to question; indeed, no question in that regard has even been raised in the whole proceeding, either on the hearing in pursuance of the statute or on the criminal proceedings in this court. It therefore having been legally determined that the bridge company maintains an obstruction to navigation and so fails to 'meet the requisitions of the law in regard to the obstructions of navigation,' it can claim no immunity or protection from the State of Pennsylvania, whose charter required that its bridge 'shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation.'"

Twelfth. "In this connection it should be noted that the financial loss sustained by this company is not in point of fact of the serious character that would at first sight appear. It has a wooden bridge come 30 years old. In the natural life of such a structure it would not have been long, were the Government taking no steps, before the company would have to replace it and expend a large sum of money in so doing. It will thus be seen that the actual loss to the company is not the cost of erecting a new and modern bridge, but

43 simply the profit arising from tolls during the life of its present structure."

Thirteenth. "Moreover, the case does not fall within the literal terms of the constitutional provision in that no 'private property (is) taken for public use.' * * * Indeed, the right of the bridge company to maintain a bridge and to collect tolls thereon is not denied, much less taken, and the effect of this proceeding is not to take

or condemn its property, but is simply to compel the company to so use its property as not to interfere with the right of the public to an unobstructed use of the stream."

Fourteenth. "But waiving its charter conditions and the duty this bridge company owes to the State of Pennsylvania, under which alone it justifies the maintenance of this obstruction, we think the paramount right of Congress to require the alteration, without compensation, of any bridge obstructing navigable interstate waters is, under the decisions of the Supreme Court, clear."

Fifteenth. "Under these authorities we are of opinion that Congress was acting within its constitutional limits in enacting that bridges, whenever they obstructed navigation, should be removed, and that without compensation made to the obstructor."

Sixteenth. "Holding then, as we do, that this law is constitutional, the proceedings under it regular and the verdict of the jury warranted, we dismiss the motion in arrest of judgment and grant the motion of the Government to impose sentence."

W. B. RODGERS.
JOHNS McCLEAVE.

44 [Endorsed:] No. 1 October Term, 1905. United States *v.* Union Bridge Company. D Exceptions to the Charge. And now, Feb'y 20, 1906 these exceptions to the charge are filed *nunc pro tunc* as of date of the charge to the jury. Jos. Buffington, Judge. ——— ———, Att'ys for Bridge Co. Filed: Feb. 20, 1906.

45 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

UNITED STATES
vs.
UNION BRIDGE COMPANY.

Sur Motion to Impose Sentence.

Sur Motion in Arrest of Judgment.

BUFFINGTON, *J.:*

This is a proceeding by the United States against the Union Bridge Company, in the nature of a criminal information, for failure to alter a bridge, which is an alleged obstruction to navigation. On the trial thereof, no issues of fact were raised; the points of law submitted by the Government were affirmed *pro forma,* those submitted by the Bridge Company denied *pro forma;* and a verdict of guilty, under the charge of the court, rendered by the jury. Motions were then made, one by the Government to impose sentence and one by the Bridge Company in arrest of judgment. In its charge the court stated an opinion would be filed later as part thereof, which is now done.

The obstruction here involved consists of a bridge over the Allegheny River just above its junction with the Monongahela at Pittsburgh. The Allegheny River rises in Pennsylvania, flows north into New York State and thence back into Pennsylvania.
46 The latter State, by Act of March 21, 1798, enacted the Allegheny, from the New York State line to its mouth, a navigable stream, and the State of New York, by Act of March 31, 1807, did likewise in its counties of Genesee and Alleghany. The Allegheny is the principal branch of the Ohio, its volume being six times greater than that of the Monongahela. It is included in the general plan for the improvement by the National Government of local inter-state water ways and the harbor of Pittsburgh. The Government has built or has now in process of construction a system of locks and dams on the Allegheny which will slackwater the stream for twenty seven miles from its mouth. The Davis Island Dam, situate five miles below Pittsburgh on the Ohio River, raises the water in the Allegheny and Monongahela at their junction six feet above their normal depths and backs its water to the first dams of the Allegheny and Monongahela slackwater systems respectively. These waters form the harbor of Pittsburgh, the importance of which harbor will be appreciated from the fact that the tonnage in water transportation passing from it the past year exceeded that of the Suez Canal for the same period. From its size, inter-state relation and its being a part of this really great harbor, it will be seen that the Allegheny answers the requirement of a navigable stream, The Mortello, 78 U. S., 411, and is also one over which the National Government has assumed jurisdiction. The Union Bridge is a
47 pier-supported, wooden structure; it crosses from Pittsburgh to Allegheny City; and is the first bridge on the Allegheny. It was built in 1874-1875 by the Union Bridge Company, a corporation chartered by the State of Pennsylvania, March 13, 1873, and was opened for travel July 1875.

In pursuance of the agreement of counsel at the argument that all Federal Acts pertinent to the cause should be considered by the Court we have examined the Federal legislation affecting the Allegheny River prior to the building of this bridge. By the Act of April 30, 1824, Congress inaugurated the system under which appropriations were annually made providing for surveys and the report thereof to Congress during the period later referred to herein, viz., from 1828 to 1838. That Act provided: "That the President of the United States is hereby authorized to cause the necessary surveys, plans, and estimates, to be made of the routes of such roads and canals as he may deem of National importance, in a commercial or military point of view, or necessary for the transportation of the public mail;" By virtue of this Act, Congress by resolution of December 9, 1828, authorized the examination of "the Allegheny river from the City of Pittsburg to the mouth of French creek, at Franklin, with
48 a view to a slackwater navigation." Such survey, a distance of one hundred and twenty-one miles, was made by the War Department and the report thereof made, which survey and report were on June 8, 1832, reported to Congress and form H. R. Docu-

ment No. 265 of the First Session of the 22nd Congress. This report showed the river could be made navigable to Franklin for a four and a half foot stage, all the year around, by a slackwater system, for eighty-five ton boats, which the report states was the type in use on the Ohio. By H. R. Document No. 343, Second Session of the 25th Congress, it appears that another survey was made in 1836-1837, in pursuance of a resolution of Congress, and the same was reported to that body on March 23, 1838. This survey was an inter-state one. It began in Pennsylvania, extended through New York State and thence to connect with the prior survey, in all a distance of two hundred and seventy-four miles. An examination of the report of the War Department Engineers shows that this survey was made in pursuance of a plan to connect the great river system of the west and southwest with the New York State canals then building. In that report the present navigation of the Allegheny was illustrated by the draft and capacity of the steamboat New Castle then engaged in that river trade. "This steamboat," the report says, "has carried and towed sixty tons. She has carried eighty passengers and
49 three hundred and fifty bushels of coal and drew two and a half feet water * * * The steamboat New Castle has ascended, without great difficulty from Pittsburg to Olean, and could even, under present circumstances, make regular trips between these places whenever there is sufficient depth of water to pass the chutes of the various dams which have been illegally erected across the river by individuals, to the serious injury of the navigation." The navigable depth to be obtained by the improvement of the Ohio was considered the desired standard for the Allegheny and confidence was expressed that, "There is no longer a doubt of the practicability of deepening the channels of the Ohio river on the bars, so as to afford at least 3½ feet of water at its lowest stage from the Mississippi to Louisville. * * * It is a navigation equal to this and upon the same plans, as near as circumstances will permit their application," the report stated, "that we wish to secure to the Alleghany river; and I entertain not the slightest doubt of the entire practicability of the undertaking." It will thus be seen that in this project, which had in view connecting the canal system of New York State with the entire river systems of the west and southwest, the Allegheny River was an important inter-state link, for, as the report stated, "if the Alleghany river should be improved from Olean to Pittsburg, a water communication is opened for a distance of
50 more than twelve thousand miles, extending far into the heart of one of the most fertile regions of the globe." The report shows that the notes, maps, profiles and plans of this work were burned and no steps were taken toward slackwatering the stream until shortly after the Union Bridge was built; but this early work by Congress evidences an assumption by the National Government, at least to the extent of survey and examination, of jurisdiction over the Allegheny as a proper subject of inter-state navigation improvement.

It will also be noted that the use of the Allegheny was included by the Government in its plans for the creation of a deep water

harbor for Pittsburgh. This is fully set forth in the report of Major Merrill of December 2, 1874, found in Chief of Engineers' report of 1875, vol. 2, p. 687. Briefly stated, that report shows a public agitation for many years for a deeper harbor for Pittsburgh; long study and investigation as to the proper type of dams by the War Department Engineers; the approval of the movable dam system; the determination to place such a dam so as to slackwater the harbor and the necessity of using the Allegheny for such harbor. The movement culminated in the passage of the Act of March 3, 1875, by virtue of which the Davis Island experimental dam, then and still the largest movable dam built, was con-
51 structed and forms the harbor of the City. In view of the public interest and agitation over this proposed improvement; the fact that the Allegheny was to be used as part of the harbor, the deterrent effect of the public notice by the engineer in charge, referred to hereafter in Judge Taft's opinion, that this bridge would obstruct navigation, becomes more significant.

By Act of Congress of March 3, 1899, it was provided as follows: "That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable water ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so as to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each
52 case a reasonable time in which to make them. If at the end of such time, the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporations, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed. Provided, that in any case arising under the provisions in this section an appeal or writ of error may be taken from the district courts or from the

existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

The proceedings in this case were had under this Act and
53 as their regularity, their conformity thereto and the fact that the Bridge Company had a legal hearing thereunder, are questioned, we deem it proper to here recite such proceedings *in extenso*. Under date of August 1902, sundry citizens, corporations and associations in and about Pittsburgh, presented a petition to the Secretary of War, setting forth the incorporation of the Union Bridge Company by the State, the building of the bridge in question, alleging it was an unreasonable obstruction to the navigation of the Ohio, Monongahela and Allegheny Rivers and praying him to investigate. It was, moreover, suggested that on such investigation, action be taken against the owners of the bridge in accordance with the Act above quoted. After presentation thereof to the Secretary, the petition was, on September 23, 1902, referred for report, to W. L. Sibert, Captain of the Corps of Engineers in charge of Government work in the Pittsburgh district. On October 13, 1902, Captain Sibert in response thereto, reported, among other things, to the Chief of Engineers, the location, height and pier-riprapping of the bridge; that it was an unreasonable obstruction to navigation; and suggested that the interests of navigation "demand that this bridge shall have a channel span giving a clear height of 70 feet above the pool made by the Davis Island Dam. This height is necessary at the Union Bridge in order to make a harbor at Pitts-
54 burgh for its immense shipping." On October 16, 1902, the petition and the report of Capt. Sibert were returned to the Secretary of War by the Chief of Engineers with the statement, "I recommend that the papers be returned to Capt. Sibert with instructions to hold a public hearing, after due notice to all interested parties, as required by the law and the orders of the War Department of Sept. 16, 1891." On October 18, 1902, this recommendation was approved by the Secretary of War and on October 23rd a reference to Capt. Sibert was ordered. Pursuant thereto notice of such hearing was given to all interested parties, that to the Union Bridge Company being served on November 3, 1902, reading as follows: "Whereas, the Secretary of War has good reason to believe that the bridge connecting the cities of Pittsburgh and Allegheny, at or near the mouth of the Allegheny River, known as the Union Bridge, is an unreasonable obstruction to the free navigation of the Allegheny River at the Pittsburgh Harbor, on account of insufficient height and width of span, and of wide and high riprapping at the piers, it is proposed to require the following changes to be made in said bridge by the 30th day of November, 1903, to wit: That the bridge be so altered as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second, or right-handed, span
55 to give a clear headroom over the Davis Island pool of not less than 70 feet, and the first span of not less than 70 feet at the pier and 62 feet at the abutment; Also that the piers of the

altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island Pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed. In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, at room 409, Post Office Building, on the east side of Smithfield Street, between Third and Fourth Avenues, in Pittsburgh, Pennsylvania, at 10 o'clock, A. M., on the 14th day of November, 1902, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision it will perhaps best suit your purpose to submit in writing whatever you may wish to present." Hearings were had on the day fixed and subsequent adjournment, which were attended by the Union Bridge Company through its attorney and several of its officers, by parties and counsel representing railroad and passenger bridges crossing the Allegheny farther up stream, by commercial bodies of Pittsburgh, by persons and companies
56 engaged in river transportation and by counsel for the City of Pittsburgh. From the minutes it appears that at the opening of such hearing, Capt. Sibert announced its objects were: first, to ascertain the fact whether this bridge was an unreasonable obstruction to navigation; second, whether the changes presented in the notice of hearing are such as navigation interests demand; third, whether the time specified in which the changes should be made is reasonable. At the hearing the Bridge Company presented an answer in which it stated, *inter alia*, "the proposition embodied in the notice from the Government will require the removal of the present structure. If carried out it will result in the entire suspension of the operations of this company, because the investment cannot yield any adequate return for the capital." No question or issue of the bridge being an obstruction to navigation was raised by the answer. Attention being specially called to this, the Bridge Company, through its counsel, stated, "I purposely omitted that because I thought it was a question largely in the discretion of the Government, and as I said, I did not care to occupy an antagonistic position, but to suggest our situation to the Government," and in passing it will be noted that no effort was made by the Bridge Company to question then or at the jury trial the fact
57 that this bridge was an unreasonable obstruction to navigation. On December 8, 1902, Capt. Sibert returned to the Chief of Engineers a record of his proceedings, together with a recommendation of a notice to alter the bridge to be given the Bridge Company. This recommendation was approved by the Chief of Engineers and adopted by the Secretary of War, Hon. Elihu Root, who on January 20, 1903, issued an order which was served on the Bridge Company on January 26, 1903, as follows: "Take notice that, Whereas, the Secretary of War has good reason to believe that the bridge of the Union Bridge Company, a corporation existing under the laws of the State of Pennsylvania, across the Alle-

gheny River, and connecting the cities of Pittsburgh and Allegheny, Pennsylvania (said bridge being known as the Union Bridge), is an unreasonable obstruction to the free navigation of the said Allegheny River (which is one of the navigable water ways of the United States) on account of insufficient height and width of span, and of wide and high riprapping at the piers; And whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation under it reasonably free, easy and unobstructed, to wit: Alter said bridge so as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second span from the Pittsburgh shore to give a clear headroom over
58 the Davis Island pool of not less than 70 feet at the pier and 62 feet at the abutment; Also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed. And whereas, eighteen (18) months from the date of service of this notice is a reasonable time in which to alter the said bridge as described, above; Now, therefore, in obedience to, and by virtue of Section 18, of an Act of the Congress of the United States entitled, 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, I, Elihu Root, Secretary of War, do hereby notify the said Union Bridge Company to alter the said bridge as described above, and prescribed that said alterations shall be made and completed on or before the expiration of eighteen months from the date of service hereof." The Bridge Company took no steps to alter, change or remove the bridge and in this shape the matter rested until July 23, 1904, three days before the expiration of the eighteen months' time provided in the notice, when its counsel presented a
59 petition to the then Secretary of War, Judge Taft, describing itself therein as the Union Bridge Company "owning and operating the Union Bridge, over the Allegheny River at Pittsburgh, Pennsylvania, under and by virtue of the authority of the United States Government," setting forth the making of the order to alter, that it would expire July 26, 1904, and praying such time be extended and a day fixed to present reasons for a rehearing. In pursuance of this petition, the Secretary of War, having temporarily suspended from time to time the order to alter the bridge, heard the arguments of counsel for the Bridge Company and thereafter, on July 21, 1905, delivered an opinion as follows: "The Union Bridge is an unreasonable obstruction to commerce of the Allegheny River. If the bridge were not there, the winter refuge which the stretch of the Allegheny River up to the next bridge would offer for the fleet of boats, which usually are moored in the Monongahela would be a very great advantage for the navigation and commerce on the Ohio River and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in

different sections of the country, have their icebreaks at different times in the early spring. The mouth of the one offers very desirable refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The
60 Union Bridge at the mouth of the Allegheny was erected at a time when the Secretary of War was not given specific control over navigable streams, and was not authorized to inhibit the construction of bridges which were likely to obstruct navigation, but it appears that an army engineer, Colonel Merrill, in charge of the district, publicly announced that this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the Government. These are the facts that I find independently of any previous adjudication; but added to this, is the finding of my predecessor, Mr. Root, to exactly the same effect, upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before me on a petition for rehearing of Mr. Root's order. As an original question I should have ruled as Mr. Root ruled, and a *fortiori*, because the orders of this Department are not to be lightly set aside, and are to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake. The petition for rehearing is denied, and the order suspending the operation of Mr. Root's order is now revoked. The order will be put in full force and executed by the proper officers, and the Union Bridge will be notified accordingly."

61 In pursuance of these directions notice was duly served on the bridge officers.

From these recited facts it is clear that the Bridge Company had notice of the hearing, that it duly appeared, that on hearing and rehearing its rights were considered, and that in pursuance of due action by the Secretary of War taken in the premises it has been determined that the bridge is an unreasonable obstruction to navigation.

These proceedings being regular and in conformity with the Act, three questions arise, viz.: first, had Congress a right to determine what is an unreasonable obstruction to the navigation of an inter-state river; second, could it delegate such power to the Secretary of War; third, is the Act of Congress in question unconstitutional, because it provides no compensation to the Bridge Company? The settlement of these questions is of grave import. On the one hand stand the people at large, represented by the National Government, who are interested in the preservation, improvement and maintenance of the water ways which nature made highways of commerce; on the other hand, we have investors, who in pursuance of State corporate authority have built bridges across such highways and invested their funds therein.

62 The country's growth and the expansion of commerce have made these bridges an unreasonable obstruction to navigation, but the bridge owner says to the Government, unless you pay for the structure, you cannot remove the obstruction. On the other hand, the Government says to the bridge builder, you cannot stay a great national power, or cripple its use by making its exercise unduly

costly, by building without Government sanction bridges on the very ground you knew the Government must use when it came to exercise its constitutional power to improve these water ways for the general good.

But before taking up these contentions, let us first ascertain the facts pertinent to this particular case, and especially the relation of this Bridge Company to the State of Pennsylvania, under charter from which the obstructing bridge was built and under which alone its existence is justified. Now it will be noted that this charter left the exact location of a bridge to the option of the Company, simply authorizing it to build one "over the Allegheny river, at any practicable point on Duquesne way, between Second street and the Monongahela river and Allegheny avenue, or any other practicable point in the City of Allegheny." Neither did it prescribe the kind of bridge, its height, its span-width or pier-location. All these matters were left to the Company, but this general right to build a bridge was
63 granted on the express condition and limitation inserted by the State in its charter, "That the erection of said bridge shall not obstruct the navigation of said river, so as to endanger the passage of rafts, steamboats or other water crafts; and the piers shall not be so placed as to interfere with tow boats proceeding out with their tows made up, and shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation." No Government or State approval of the bridge, prior to its erection, is shown or alleged. In Dugan *vs.* Bridge Company, 27 Pa. St. 310, a charter having a provision of this general character, was under consideration and it was there said by the Supreme Court of Pennsylvania: "In measuring corporate rights, we are to look at all the terms employed in the fundamental law or compact. We can no more cut out some of them or mitigate their legal effect because they are in a proviso, than we could qualify the terms of a private agreement because found in one part of the instrument instead of another. The whole instrument is to be taken together as expressing the final intentions and purposes of the parties. When the legislature tells a company, you may erect a bridge over a particular stream, provided you do not impair the navigation thereof, it is for the company to determine whether they will accept the franchise on such a condi-
64 tion; but if they accept it, they take it *cum onere,* and, having no rights outside of their charter, they must enjoy their franchise, subject to that condition or not enjoy it at all." But this prohibition against the bridge obstructing navigation thus expressed by the State in its charter was nothing more than the obligation the laws and decisions of that State imposed by implication. Prior to the adoption of the Federal Constitution, the Province of Pennsylvania, by Act of August 14, 1725, provided, "That no bridge, frame or device whatsoever shall at any time to come be made, erected, upheld, sustained or repaired, over any creek or river within this province, navigable for any sloop, shallop, flat, or other craft, that shall or may (in) anywise stop or hinder the navigation of any such sloop, shallop, flat or other craft, or floats of logs: any law, custom or usage to the contrary notwithstanding." And the special care which Pennsyl-

vania exercises to preserve its waterways from obstructions is seen in Dugan *vs.* The Bridge Company, *supra,* wherein it was said: "The navigation of the streams of a country is of great public interest, and the law has always treated obstructions as *public nuisances.* In Rex *v.* Clark, 12 Mod. 615, Ch. J. Holt said, that to hinder the course of a navigable river was against Magna Charta; and many subse-
65 quent statutes have punished it, in England, with specific penalties. In this country, and especially in Pennsylvania, the navigation of our rivers has been sedulously guarded both by legislative action and judicial opinion." Moreover, the courts of that State have held in the case last quoted that a duty is imposed on a bridge company to keep pace with the expansions of commerce and so change or alter its bridge as not to obstruct such enlarged commerce, saying: "The legislature must be presumed to have had all the natural growth of this trade (coal) in view when they authorized the bridge. * * * We * * * are enabled to say that the true meaning of the Act of incorporation is that the bridge was to be so built as not to injure, stop or interrupt the navigation, either then or now, whether in its infancy or full growth." In view of these holdings it is clear that the bridge has no warrant or countenance from the State of Pennsylvania to justify its further continuance if it be an obstruction to navigation. Such being the case we pass to the next question—has Congress a right to determine what is an unreasonable obstruction to the navigation of an inter-state river?

By Section 8, Article 1, of the Constitution, it is enacted that "Congress shall have power * * * to regulate commerce * * * among the several states * * * to make all laws which
66 shall be necessary and proper for carrying into execution the foregoing powers." In The Wheeling Bridge Case, 18 Howard 425, it was decided that Congress had such power and that its enactment that a certain bridge was not an obstruction to navigation was in effect a vacation of a previous decree of the Supreme Court of the United States that such a bridge was an obstruction. This decision was approved in the later case of South Carolina *vs.* Georgia, 93 U. S. 13, where in discussing it the court said: "There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, *in the judgment of the law,* an obstruction of navigation. * * * The case of The Clinton Bridge, 10 Wall. 454, is in full accord with this decision. It asserts plainly the power of Congress to declare what is and what is not an illegal obstruction in a navigable stream." To the same effect are Gray *vs.* Chicago, 27 U. S. 454, and Miller *vs.* New York, 109 U. S. 393, in the latter of which it is said: "Having power to regulate commerce with foreign nations and among the several states and navigation being a branch of that commerce, it (Congress) has the control of all navigable waters between the states or connecting with the ocean, so as to preserve and protect
67 their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive."

Indeed the power of Congress to regulate navigation being established—Gibbons *vs.* Ogden, 8 Wheaton 1; Gilman *vs.* Philadelphia, 3 Wall. 713—and Congress having the constitutional right to make all laws necessary and proper for carrying into execution its powers, it would (apart from all controlling decisions) seem that in Congress must necessarily vest the power to determine what obstructs navigation, for unless it have power to determine what obstructs, it is without power to control and regulate navigation. And indeed, whether a thing obstructs navigation or not is a question not of law but fact: "What does encroach on or straiten the harbor, or lessen the depth of water and navigation, is a fact, *questio facti*, 10 Price 374," says Mr. Justice Woodbury in United States *vs.* New Bedford, 1 Woodb. & M. 401; Fed. Cases No. 15,867. It would therefore follow that Congress should have the power, with the effectiveness of a judicial decree, to determine what is an obstruction to navigation, or as was said in the Wheeling Bridge case, *supra*, "The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be
68 deemed in judgment of law an obstruction to navigation."

Seeing then the clear right of Congress to determine what obstructs navigation, we next inquire whether if having enacted that certain obstructions in certain waters shall be removed, it is restricted to itself determining where such obstructions exist and is without power to call to its aid other aids or agencies in that regard. The broad and general power to regulate commerce being vested in Congress and that without any limitation as to the means or manner in which it shall be done, the grant would seem to carry with it the implied right to employ every agency needful to the due exercise of the power: "It is a general principle of law in the construction of all powers of this sort, that where the end is required, the appropriate means are given;" United States *vs.* Bailey, 9 Peters, 255. Indeed, to strip Congress of the right to resort to departmental aid and professional engineering skill and to restrict the exercise of its powers in that regard to express legislation affecting each particular case would be practically prohibitive of all legislation on the subject. The objections to such a course are well stated in United States *vs.* Moline, 82 Fed. Rep. 592, where it is said: "The first question (is the bridge an obstruction to navigation) is purely administra-
69 tive and is one that Congress can certainly delegate to the Secretary of War. A thousand questions of equal moment to the parties interested and of equal difficulty are necessarily delegated to the great departments of the government every month. In the very nature of things Congress cannot dispose of them. A Government of the size of this, operated upon such a conception, would be clogged immediately." To the same effect is Chatfield *vs.* New Haven, 110 Fed. Rep. 792. And in Miller *vs.* New York, 109 U. S. 395, it was said: "The execution of a vast number of measures authorized by Congress and carried out under the direction of heads of Department- would be defeated if such were not the case. The efficiency of an Act as a declaration of legislative will must of course, come from Congress, but the ascertainment of the contingency upon

which the Act shall take effect may be left to such agencies as it may designate." Reference may also be made to South Carolina *vs.* Georgia, 93 U. S. 13, which recognized the action of the Secretary of War in completely closing one channel of the Savannah River by a crib and forcing the water into another channel under a general grant of money "for the improvement of the harbor of Savannah," as an authorization of such work by Congress. Of course, it must be conceded that the power to legislate, that is, to say what the law is, is vested in Congress alone, but by the Act now before us
70 Congress did not delegate to the Secretary of War any power to fix or make the law. By this general Act Congress itself enacted what should be done when an obstruction existed and all the power conferred on the Secretary of War was to determine when the law should be enforced; and that this authority should not be abused, a party considering himself aggrieved is by the Act given a direct appeal to the court of highest resort. That administrative duties in carrying out legislative powers may be delegated to Departments has been held in many cases, among which we cite: Field *vs.* Clark, 143 U. S. 649; Caha *vs.* United States, 152 U. S. 212; Bushnel *vs.* Leland, 164 U. S. 684; Railroad Co. *vs.* Ohio, 165 U. S. 365; United States *vs.* Ormsbee, 74 Fed. 207; Grady *vs.* United States, 98 Fed. 239; Dastervignes *vs.* United States, 122 Fed. 35.

It being shown then that Congress has power to control navigation, that the Allegheny is an inter-state, navigable stream, that Congress has assumed control over it, that acting by the Secretary of War it has determined the bridge in question to be an obstruction to navigation and ordered its alteration, and the Bridge Company having wilfully refused so to do, the burden of justifying a further continuance of that which the supreme law making power of the
71 land has determined to be an obstruction to navigation rests upon the Bridge Company so obstructing. That the bridge is an obstruction to navigation is now settled and is not now open to question; indeed, no question in that regard has even been raised in the whole proceeding, either on the hearing in pursuance of the statute or on the criminal proceeding in this court. It therefore having been legally determined that the Bridge Company maintains an obstruction to navigation and so fails to "meet the requisitions of the law in regard to the obstructions of navigation," it can claim no immunity or protection from the State of Pennsylvania, whose charter required that its bridge "shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation."

But it is contended the Act of Congress under which this proceeding is had is unconstitutional because it makes no provision for compensation and therefore violates the Fifth Amendment to the Constitution, which enacts, "nor shall private property be taken for public use without just compensation." In this connection it should be noted that the financial loss sustained by this company is not in point of fact of the serious character that would at first sight appear. It has a wooden bridge some thirty years old. In the

natural life of such a structure it would not have been long,
72 were the Government taking no steps, before the company would have to replace it and expend a large sum of money in so doing. It will thus be seen that the actual loss to the company is not the cost of erecting a new and modern bridge, but simply the profit arising from tolls during the life of its present structure. Moreover, the case does not fall within the literal terms of the constitutional provision in that no "private property (is) * * * taken for public use." The facts are not as they were in the case of the Monongahela Navigation Company *vs.* the United States, 148 U. S. 312; its bridge is not taken and used by the Government for public purposes, as were the dams and locks of the navigation company in that case. Indeed, the right of the Bridge Company to maintain a bridge and to collect tolls thereon is not denied, much less taken, and the effect of this proceeding is not to take or condemn its property, but simply to compel the company to so use its property as not to interfere with the right of the public to an unobstructed use of the stream. It is simply the enforcement of the time honored maxim which qualifies the absolutism of all property rights: *sic utere tuo ut non alienum lædas.* It would be a strange anomaly that a demand made by the law upon one to perform a lawful duty must be preceded by compelling the law enforcer to provide compensation to
73 the law violator for what is maintained in violation of law. It seems to us the statement of such a proposition is an answer to a claim for compensation. There can be no lawful compensation for an unlawful structure. But waiving its charter condition and the duty this Bridge Company owes to the State of Pennsylvania, under which alone it justifies, the maintenance of this obstruction, we think the paramount right of Congress to require the alteration without compensation, of any bridge obstructing navigable interstate waters is, under the decisions of the Supreme Court, clear. In the first place we have a law, enacted by a co-ordinate branch of the Government, in which there is no uncertainty; it is directed against all bridges, those already built or to be built: "any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States," are its words. There can be no doubt of the clear legislative intent to compel alterations of such bridges as obstruct, and that without compensation. Shall this law be set aside as unconstitutional? The question is one of serious import from a National standpoint, for it is clear that if an obstruction must be paid for before navigation can be improved, the improvement of navigation faces a grave menace. Unfortunate as this might be, still, if the enforce-
74 ment of any Act of Congress sacrifices the constitutional right of the citizen, the Act must yield to the higher law of the constitution. But when a statute has been passed by the legislative branch of the Government, the judicial branch will act with great caution in declaring it unconstitutional, and will do so "only," as Chief Justice Black of Pennsylvania said in Sharpless *vs.* The Mayor of Philadelphia, 21 Pa. St. 164, "when it violates the constitution clearly, palpably, plainly, and in such manner as to leave no doubt

or hesitation on our minds." Or as Chief Justice Marshall said, in Fetcher *v.* Peck, 6 Cranch 126: "The question, whether a law be void for its repugnancy to the constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Now in passing this law and thereby seeking to fulfil its constitu-
75 tional duty to regulate commerce, Congress would properly be guided by the holdings of the Supreme Court in reference to that power. As we study those decisions it would seem the views of that court are stated in no uncertain terms. Turning as we naturally do to the fountain head of American constitutional construction, we find the dominant power of Congress in that regard was asserted at an early day by Chief Justice Marshall in the case of Willson *vs.* Black Bird Creek Marsh Company, 2 Peters 245. There a corporation, under authority of a charter from the State of Delaware, built a dam across the navigable water in question. A vessel owner broke down the dam and sought to justify his act on the ground that it was an obstruction to navigation. His contention in that regard was not sustained, the court holding that the dam, having been built by authority of the State of Delaware, was, in the absence of legislation by Congress, a lawful structure. But in delivering its opinion the court went further and said: "Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this Act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But
76 this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the Government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations, and among the several states.' If Congress had passed any Act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and lower states; we should feel not much difficulty in saying, that a state law coming *to* conflict with such act would be void. But congress has passed no such act." We cannot but regard this statement of the great Chief Justice at that early day—1835—a statement, it will be observed, not necessary to the disposition of that case—was purposely inserted to prevent any misunderstanding and as a timely warning to those who might there-

after act under state sanction in placing structures in streams, that they were doing so in the face of a dominant, controlling power in Congress and that when that dormant power was exercised all else must yield thereto; that the structure might lawfully be
77 placed there for the time being by State power, but that structures, thus State authorized, might become obstructions, nationally abated, when Congress exercised its dormant, but none the less dominant power, to regulate commerce. And this early assertion of paramount Federal control is made in all the later cases where the power is discussed. In them will be found the assertion that the right, when Congress acts, is not concluded by anything the States or individuals acting under them, have done; that the power of Congress is not affected by its silent acquiescence or inaction; that it may remove offending structures. Thus the absolute scope of this power when Congress undertook to exercise it is asserted in Williamette Iron Bridge Company *vs.* Hatch, 125 U. S. 1, where the court say: "And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, *it is not concluded by anything that the states or that individuals by its authority or acquiescence have done, from assuming entire control of the matter, and abating any erections that may have been made,* and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams." In
78 Escanaba Company *v.* Chicago, 107 U. S. 683, the power of the state, in the absence of congressional legislation to maintain and regulate bridges over inter-state navigable waters was recognized. But the dominant control of Congress and the right to abate State authorized structures when they obstructed navigation was vigorously asserted. Says Mr. Justice Field: "Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the City of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And no where could the power to control the bridges in that City, their construction, form and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the City upon whom it has devolved that duty. *When its power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction.* If the power of the State and that of the Federal Government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the constitution to legislation in pursuance of it, as the supreme law of the land. But until congress acts on the subject the power
79 of the state over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest periods, and approved in repeated cases, the most notable of which are Willson *v.* Black Bird Creek Marsh Company, 2 Pet. 245, decided

in 1829, and Gilman *v.* Philadelphia, 3 Wall. 713, decided in 1865." To the same effect is the case of Gilman *v.* Philadelphia, *supra.* where, long prior to the building of this bridge, it was said: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by congress. (Gibbons *v.* Ogden, 9 Wheaton, 1; Corfield v. Coryell, 4 Washington C. C. 378.) This necessarily includes the power to keep them open and free from any obstruction to their navigation, *interposed by the state or otherwise;* to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes congress possesses all the power which existed in the states before the adoption of the national constitution, and which have always existed in the
80 parliament in England. It is for congress to determine *when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided.* (United States *v.* New Bedford Bridge, 1 Woodb. & Minot, 420, 421; United States *v.* Combs, 12 Peters 72; New York *v.* Milne, 11 Id. 102, 155.) * * * Lastly, congress may interpose whenever it shall be deemed necessary by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges and punish those who shall thereafter erect them. Within the sphere of their authority both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the constitution, and is abnormal and revolutionary." In Pound *vs.* Turck, 95 U. S. 459, a dam and boom were placed in the Chippewa River in pursuance of authority granted by the State of Wisconsin. The plaintiff was injured by the obstruction but the defendant justified, in the absence of congressional legislation, under the state law. The defence, as in the Marsh Creek case was held good, but just as in that case the court took occasion to assert the paramount control of congress when it saw fit to exercise such control, saying: "There are within the state of Wisconsin, and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great
81 rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of congress to interfere and control the matter whenever it may be necessary to do so, the exer-

cise of this limited power may all the more safely be confided to the local legislatures." So also in Cardwell *vs.* American Bridge Co., 113 U. S. 205, while the limited power of the state to control and maintain bridges is recognized, yet the dominant power of congress to control those so authorized is broadly asserted. Referring to the decisions cited, the court says: "They recognize the full power of the states to regulate within their limits matters of internal police, which embrace, among other things, the construction, repair and
82 maintenance of roads and bridges. * * * And that, as to bridges over navigable streams, their power is subordinate to that of congress, as an act of the latter body is, by the constitution, made the supreme law of the land; but that until congress acts on the subject their power is plenary. When congress acts directly with reference to the bridges authorized by the state, its will must control so far as may be necessary to secure the free navigation of the stream."

The argument is, however, advanced that the Government having made no objection to the bridge prior to its erection has, in some way, by its inaction legalized the bridge as against itself and thereby become liable to compensate the owners before ordering its alteration. We are referred, however, to no principle of estoppel or laches that would avail to thus compel the holder of a discretionary power to exert it immediately at peril: "It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided"; Gilman *vs.* Philadelphia, *supra*, and cases therein cited. And indeed, to apply an analogous principle—statutes of limitations do not affect the sovereign's rights. If one at his own instance or acting under authority of a State, should in the absence of any inducing action by the Government,
83 occupy land of the letter and place improvements thereon, manifestly such unauthorized improvement would be no bar to the Government abating or removing the same when it saw fit to assert its dominant power. The laches, if any, are not those of the Government, but of the improver who neglected to secure prior Federal consent: "It is for this reason, namely, the *un*timate (though yet unexerted) power of congress over the whole subject matter, that the consent of congress is so frequently asked to the erection of bridges over navigable streams"; Williamette Iron Bridge Co. *vs.* Hatch, *supra*. And not only, as we have seen, was consent of congress as a precautionary measure not obtained, but the relation of the Government to this stream and the harbor of Pittsburgh were then such as might well admonish a prudent investor proposing to bridge the stream and narrow the harbor to acquaint himself with the plans of the Government before starting such an undertaking: "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it"; Kennedy *vs.* Greene, 3 Myl. & K., 722, quoted in Wood *vs.* Carpenter, 101 U. S. 141, and "Means of knowledge with the duty of using
84 them are deemed equivalent to knowledge itself, and passive good faith will not serve to excuse wilful ignorance"; 21

Am. & Eng. Ency. Law, 584, and cases cited. In the County of Mobile *vs.* Kimball, 102 U. S. 698, the subject of improvements in the line of commerce and therefore of navigation made under State authorization was considered. The distinction was drawn between those of a general nature, which in the nature of things must, in order to ensure uniformity, be left solely to Congress and those, "where from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated." It was there held that "the improvement of harbors, bays and navigable rivers within the State falls within this last category of cases," and in that case there being no action by Congress on the subject, legislation by the State of Alabama providing for the improvement of the harbor of Mobile was held legal. But while the State control thus assumed was recognized the court laid down the principle that the inaction of the Congress was not a surrender of the power or a declaration that nothing shall thereafter be done by Congress. "State action," says the court, "upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the
85 state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority."

Under these authorities, we are of opinion that Congress was acting within its constitutional limits in enacting that bridges, whenever they obstructed navigation, should be removed, and that without compensation made to the obstructor. The absolute, dominant, controlling power of Congress over navigation had been asserted before this bridge was built. While the power of the State to authorize structures was recognized, yet the limited nature of that power and that it must be exercised and enjoyed subject to the dominant control of the constitutional, and therefore higher, power, had been as clearly pointed out, so that when the State of Pennsylvania empowered this company to build its bridge so that it should "meet the requisitions of the law in regard to the obstructions of navigation," there was no doubt as to the source from which those requisitions would ultimately come. In this case Congress has
86 acted, as it strikes us, with great magnanimity and with considerable regard to the situation in which this company itself placed itself. In 1874, the Government's engineers reported to it, vol. 2, Chief of Engineers' Report, p. 686, that the bridge was an obstruction as follows: "Below the Saint Clair street suspension bridge was a space of 3,000 feet, with excellent water at all stages. This space was always occupied by steamboats, to the great relief of the main harbor in the Monongahela, which is usually excessively crowded with coal tow-boats and barges. This use of the Allegheny has been entirely destroyed by the Union Bridge, as large boats cannot get under the bridge in any stage of water, and small boats cannot do so

when the water is above average stages. * * * To thoroughly utilize this improved harbor it is essential that first class boats should be able to traverse the Allegheny and Monongahela harbors with freedom. But the Union Bridge entirely closes up the mouth of the Allegheny and thus destroys half of the benefit to be derived from the proposed improvements. * * * In view of all these facts I am constrained to report that the Union Bridge is a serious and unnecessary obstruction to navigation, and to recommend that measures be at once taken to compel its owners to make such modifications as will permit the safe passage of the boats that usually navigate
87 the Ohio up to Pittsburgh." Indeed that Congress, in the face of such information, has allowed this bridge to stand for thirty odd years thereafter and be used meanwhile to reimburse to that extent its owners by tolls; that during that time the bridge has precluded the use of half the expensive harbor improvements made by the Government, are in themselves proof that an absolute power in Congress to remove obstructions to navigation, when it saw fit to exercise the power, was wisely intrusted to that body in full confidence that such power would be exercised with due regard to the situation in which the obstructor had placed himself.

Holding then, as we do, that this law is constitutional, the proceedings under it regular and the verdict of the jury warranted, we dismiss the motion in arrest of judgment and grant the motion of the Government to impose sentence.

88 [Endorsed:] No. 1, October Term, 1905. Criminal Docket. In the District Court of the United States for the Western District of Pennsylvania. United States *vs.* Union Bridge Company. Opinion of the Court. M D Filed: 5.30 P. M. February 9" 1906.

89 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
v.
THE UNION BRIDGE COMPANY.

And now, to-wit, this 15th day of January, in the year 1906, comes the defendant in the above entitled cause by its counsel and moves the court to order and direct that judgment upon the verdict herein rendered be arrested for the following reasons:

First. The Information herein filed, as conceded by the Government, is based upon and authorized only by the 18th Section of the River and Harbor Act of the Congress of the United States, approved March 3rd, 1899; and said act of the Congress of the United States is unconstitutional, null and void and no authority for this prosecution for the following reasons:

(*a.*) In that it undertakes to take or destroy private property of the Union Bridge Company without due process of law.

(*b.*) In that it undertakes to take the private property of the Union Bridge Company for public use without making just compensation therefor.

(*c.*) In that the said act attempts to unlawfully delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army legislative powers be-
90 longing exclusively to Congress, in contravention of the Constitution of the United States.

(*d.*) In that the said act undertakes unlawfully to delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army judicial powers in respect to the bridge of the defendant company exclusively vested by the Constitution in the judiciary of the United States.

Second. That there is no sufficient evidence in the cause to support a conviction of the defendant of the charge made in the Information.

W. B. RODGERS,
McCLEAVE & WENDT,
Attorneys for Union Bridge Company.

91 [Endorsed:] No. 1 October Term, 1905. The United States of America, *v.* The Union Bridge Company. Motion in Arrest of Judgment. Filed Jan. 15th 1906. H. D. Gamber Clerk. Wm. B. Rodgers, McCleave & Wendt, Att'ys for Union Bridge Co.

92 *Copy of Act of Legislature of New York, Declaring Certain Waters in Counties of Genessee and Allegany to be Public Highways, &c.*

Ex. No. 1. 1/10/06. L. D. I.

CHAP. LXXVIII.

An Act declaring certain waters in the counties of Genesee and Allegany to be public highways, and for other purposes.

Be it enacted by the people of the state of New York, represented in Senate and assembly, That all that part of the Allegeny river, and all that part of the Oswogo or Oswaye creek, and all that part of the outlet of the Chataughqua lake, that are within the counties of Genesee and Allegany, are hereby declared to be public highways.

And be it further enacted, That if any person or persons shall obstruct the navigation of either of the above described waters, by erecting or building any mill-dam or wier, or by the building or erecting thereon any other works, or by cutting or falling wood or timber in the same, every person so offending, shall forfeit for each and every such offence a sum not exceeding twenty-five dollars, to be recovered, with costs of suit, by and for the use of any person

who will sue for the same, before any justice of the peace, in the county wherein such offence shall be committed; and the person or persons so offending shall moreover be deemed guilty of a misdemeanor, and be prosecuted accordingly by indictment: *Provided nevertheless.* That if any person or persons, who have heretofore erected or shall hereafter erect any dam across either of the aforesaid streams, for the use of any mill or other works, if such person or persons shall cut a sufficient canal through such dam, or shall so construct the same as not to injure the navigation of said streams, then such person or persons who have erected or shall hereafter erect a dam or other works, on either of the said streams, shall not be liable to the penalties contained in this act.

And be it further enacted, That it shall be lawful to hold a circuit court in the county of Genesee, on the second Tuesday of June next, any law to contrary notwithstanding.

* * * * * * *

In Council of Revision, March 31st, 1807.

Resolved, That it does not appear improper to the council, that this bill should become a law of this state.

MORGAN LEWIS.

STATE OF NEW YORK, *Office of the Secretary of State, ss:*

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom, and the whole of said original law.

Given under my hand and the seal of office of the Secretary of State, at the City of Albany, this 29th day of August in the year one thousand nine hundred and four.

[Seal Secretary of State, State of New York.]

HORACE G. TENNANT,
Second Deputy Secretary of State.

93 [Endorsed:] #1 Oct. T., 1905. Criminal Dock. United States District Court, Western District of Pennsylvania. United States *vs.* Union Bridge Co. Copy of Act of N. Y. Legislature declaring certain waters to be public highways &c. D. Filed: Jan. 11/1906.

94 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
v.
THE UNION BRIDGE COMPANY.

Coram: Hon. Jos. Buffington, *J.*, and a Jury.

Notes of Trial.

Appearances: Messrs. John W. Dunkle, R. M. Gibson, and Albert Bettinger, for U. S. Government. Messrs. W. B. Rodgers and McCleave & Wendt, for Union Bridge Company.
L. D. Iams, Reporter.

95 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
v.
THE UNION BRIDGE COMPANY.

Coram: Hon. Jos. Buffington, *J.*, and a Jury.

And now, Tuesday, January 9th, 1906, this cause came on to be heard at 10 o'clock A. M., before the Hon. Joseph Buffington, Judge of said Court and a jury that had been previously selected from the panel at the October Term of Court. One of the jurors so selected being unable to be present on account of illness, and one other not appearing, the panel was filled by selecting two talismen, by agreement of counsel.

Appearances:—Messrs. John W. Dunkle and R. M. Gibson, U. S. District Attorney and his assistant and Mr. Albert Bettinger, special counsel, on behalf of the United States government, and Messrs. W. B. Rodgers and McCleave & Wendt, representing the defendant company.

96 In order to give the Marshal sufficient time to get the necessary talismen, an adjournment was had until 2 o'clock P. M.

At the afternoon session, the two additional jurymen were selected, and the jury was sworn at 2:55 P. M.

The motion to quash the indictment previously made on behalf of defendant was waived by its counsel, and the defendant plead not guilty.

Case opened to the jury on behalf of the plaintiff by Mr. Bettinger.

Counsel for the plaintiff called attention to an interlineation made on the original indictment and explained that by mistake he had made this interlineation on the original copy of the indictment, believing it to be his office copy thereof, and asked permission to cross out said interlineation, which was granted.

Court here adjourned until Wednesday, January 10th, 1906.

97 Wednesday, January 10th, 1906.—Trial resumed at 9:30 A. M.

Major W. L. SIBERT, being called on behalf of the government, being duly sworn, testifies as follows:

Direct examination by Mr. DUNKLE:

Q. Where do you reside?
A. In Pittsburgh, Pennsylvania.
Q. How long have you resided here?
A. About four years, or a little more.
Q. What position under the government do you hold?
A. I am an officer in the corps of engineers in the United States army, and charged with the work of improving the Allegheny and Monongahela Rivers and that part of the Ohio lying within the State of Pennsylvania.
Q. What is your official designation here?
A. I am a major in the corps of engineers of the army in charge of the Pittsburgh district.
Q. Do you know where the Union Bridge is located?
A. Yes, sir.
Q. You may state where?
A. It is located now in the Allegheny River, near its mouth.
Q. Who is the owner of that bridge?
98 A. The Union Bridge Company.

Cross-examination by Mr. MCCLEAVE:

Q. When did you come to Pittsburgh in charge of this district?
A. In December, 1901.
Q. The Union Bridge, owned by the Union Bridge Company, as you testified, was located across the Allegheny River in its present place at that time, was it?
A. At that time.
Q. Do you know how long it had been there?
A. Only from the records of my office. That is to say, I didn't see it built there.
Q. Well, it had been there for some years previous to that?
A. It had been there since about 1874, speaking from the records of my office.
Q. And it is a toll bridge, is it?

A. Well, I am not competent to testify as to that. I understand it to be so.

Q. Well, you know as a fact, major, that tolls are collected for passage across the bridge?

A. Well, I can't testify to that as a fact. I have never been across it.

Q. Have you a pass on the bridge?

99 A. No, sir; I have not.

Q. Well, did you ever undertake to cross it?

A. No, sir; I never undertook to cross it.

Counsel for the Government offers in evidence, as Exhibit No. 1, a certified copy of the Act of the Legislature of the State of New York, entitled "An Act declaring certain waters in the counties of Genessee and Allegany to be public highways," approved March 31, 1807; this having attached to it a certificate of the Second Deputy Secretary of State, Horace G. Tenant, and under the great seal of the State of New York; the purpose of the offer being to show that the Alleghany River is an interstate navigable stream, to be followed by evidence showing that it flows through the States of New York and Pennsylvania.

Objected to by counsel for defense, for the purpose offered, in that the offer merely shows a declaration of the State of New York declaring the Allegheny River within certain specificied counties in that State a public highway; and does not tend to support

100 the offer, to wit, to show that the Allegheny River in the State of New York, as a matter of fact, is a navigable stream.

Objection overruled by the Court, and exception noted to defendant.

Counsel for Plaintiff read that portion of the Act just admitted that is material to this case.

Counsel for the Plaintiff also offers in evidence an Act of the General Assembly of the state of Pennsylvania, entitled "An Act declaring the Rivers Ohio and Allegheny and certain branches thereof public streams or highways," approved March 21, 1796—Laws of Pennsylvania, 1790 to 1802, page 320—for the purpose of showing that the Allegheny River is a public highway and navigable in the State of Pennsylvania.

Offer objected to by counsel for defendant, as incompetent and irrelevant, for the purpose stated.

Objection overruled, and exception noted to defendant.

101 Counsel for plaintiff also offers an Act of the Legislature of the State of Pennsylvania entitled, "An Act declaring the part of Brush Creek in the County of Bedford, and part of the Allegheny River and Oswaye and Conondaue Creeks in the counties of Potter and McKean, and Bald Eagle Creek in Center County, public streams and highways," approved March 4, 1807—Laws of Pennsylvania 1802, to 1808, page 369; for the purpose of proving that the Allegheny River is a navigable stream or highway in the State of Pennsylvania.

Objected to by counsel for defense, as incompetent and irrelevant, for the purpose stated.

Objections overruled and exception noted to defendant.

Plaintiff also offers certified copy of Charter of Letters Patent to the Union Bridge Company, given under the hand of the Secretary of the Commonwealth, with the great seal of the State attached thereto, dated August 17, 1873; said copy being marked as Exhibit No. 2.

102 Plaintiff offers certified copy of the notice of the Secretary of War to the Union Bridge Company dated January 20, 1903, so to alter the same as to render navigation through or under the Union Bridge reasonably safe, easy and unobstructed, which said notice was served January 26, 1903, under oath of Wm. L. Sibert, on the President of the Union Bridge Company; this to be followed by evidence showing the compliance by the Secretary of War with the 18th Section of the River & Harbor Act of March 3, 1899; said copy being marked as Exhibit No. 3 in this case.

Offer objected to by counsel for defense, as incompetent and irrelevant; and, further, that under the 18th Section of the Act of March 3, 1899, referred to in the paper offered, the Secretary of War had no lawful authority to make or issue said order.

Objections overruled and exception noted to defendant.

Notice read.

103 The offers of record evidence is here suspended, for the purpose of examining two witnesses who desire to get away.

EMIL SWENSON, called on behalf of the Government, sworn, testified as follows:

Direct examination by Mr. DUNKLE:

Q. Where do you reside?

A. In Pittsburgh.

Q. How long have you lived here?

A. Since 1887.

Q. What is your official business?

A. Civil Engineer, especially in the line of bridges.

Q. How long have you been engaged in that business?

A. As Civil Engineer, for over twenty-five years, and since 1885 in bridges.

Q. What has been your work in connection with civil engineering, principally?

A. Railroads and bridges.

Q. How many bridges have you constructed, or about how many, if you know?

A. Well, I don't know how many. I was connected with

104 the Carnegie Steel Company, and the Keystone Bridge Construction Department of the Carnegie Steel Company here in Pittsburgh for over fourteen years, and we did any where from twenty five to thirty thousand tons a year. I had full and complete charge of the plans for building bridges for six years. During that time, we built right around Pittsburgh here the Bessemer bridge over the Allegheny River, and the B. R. & P. bridge, that is, the Buffalo Rochester and Pittsburgh Bridge, over the Allegheny River; and we

built the Fort Perry for the Union Railroad, and built the Rankin bridge for the Union; that was two bridges over the Monongahela river; they are what we call hot metal bridges, for carrying hot metal, as well as other freight, from the Carnegie plants.

Q. Now, I will ask you if, in 1902, you studied in detail a plan for a bridge across the Allegheny River that would comply with the order of the Secretary of War to the Union Bridge Company just read?

A. I did.

Q. This order, you will note, was given on the 20th of January, 1903. What, in your opinion, would have been a reasonable
105 time in which to make the alterations in the Union Bridge necessary, in order to comply with the order of the Secretary of War.

Objected to by counsel for defendant, as incompetent and irrelevant.

The Court here asked a question of counsel for defense, and after some discussion, the Court said:

If the objection is made that the testimony is premature, I don't know but I will sustain it, because there is no need of going into this if there is to be no contention of that kind raised.

By Mr. McCLEAVE: We don't make the objection on the ground of the offer being premature, but that there is nothing in the case to make it relevant.

By the COURT: Just what is the objection that you do make?

By Mr. McCLEAVE: It is wholly irrelevant here to under-
106 take to justify the order of the Secretary of War. The offense with which we are charged is simply a non-compliance with the order, and I do not therefore see how it is relevant here to undertake to show whether that order gave a reasonable time.

Mr. GIBSON: This is for the purpose of showing that the Secretary proceeded in a legal manner under the law. It is not proposed to review the finding.

By the COURT: At this stage of the case, we regard the testimony as irrelevant, and therefore sustain the objection, without prejudice to the right of the Government to call the witness in rebuttal, if the question of the unreasonable time allowed by the order of the Secretary is raised.

Witness withdrawn.

Counsel for the Government now offers, as Exhibit No. 4, a certified copy of a letter of the Chief of Engineers of the United States Army,
by A. McKenzie, colonel of the Corps of Engineers, dated
107 January 23, 1903, directing Captain W. L. Sibert to serve the foregoing notice on the Union Bridge Company.

Objected to by counsel for defense, as irrelevant and incompetent.

Objections overruled and exception noted to defendant.

Counsel for the Government also offers, as Exhibit No. 5, certified copy of petition of the Union Bridge Company, by O. D. Thompson, attorney, dated July 23, 1904, requesting that the order of the Secretary of War directing the Union Bridge Company to alter the Union

Bridge on or before July 26, 1904, be extended and a time fixed to present reasons for a rehearing.

Offer objected to by counsel for defense, as incompetent and irrelevant, and purpose of offer requested.

Mr. DUNKLE: The purpose is to show the extension by
108 the Secretary of War to the Union Bridge Company of the time allowed to make the changes directed by the notice given.

By Mr. McCLEAVE: It doesn't show that. This offer is merely a copy of a petition of the Union Bridge Company for an extension.

By Mr. DUNKLE: Well, I might add, this to be followed by memoranda or order from the Secretary of War extending the time.

By Mr. McCLEAVE: Well, we object to it. The offense was committed in July, 1905, whether there was any order extending the time or not. I cannot therefore see how it is relevant.

Objection overruled, and exception to defendant.

Exhibit No. 5, the petition just offered, read.

Government also offers, as Exhibit No. 6, certified copy
109 of order or letter of the Secretary of War to General McKenzie, Chief of Engineers, dated July 24, 1904, directing him to notify the Union Bridge Company that the order requiring the change of the bridge would be extended from July 26, 1904, to August 10, 1904.

Mr. McCLEAVE: I suppose this all comes under the same general line of offers.

Exhibit No. 6 read.

Counsel for the Government also offer, as Exhibit No. 7, a certified copy of memorandum or order of the Secretary of War, dated Dept. 28, 1904, extending the time to Dec. 1, 1904.

Offer read.

Counsel for the United States also offer, as Exhibit No. 8, certified copy of memorandum or order of the Secretary of War dated Nov. 10, 1904, further extending the time to January 1, 1905.

Offer read.

Government also offers, as Exhibit No. 9, certified copy of order of Secretary of War Taft, dated June 21, 1905, refusing petition
110 of the Union Bridge Company for rehearing.

Mr. McCLEAVE: We object to this, as irrelevant and incompetent. The information charges us with not complying with the order of Elihu Root, Secretary of War, made January 20, 1903. We are not informed against here for violating any order ever made by Secretary Taft, or approved by him. We do not therefore see how the action of Secretary Taft with reference to the violation of any order made by his predecessor becomes relevant to this case. And it sets forth the reasons governing the then Secretary in respect to the order he then made, with which we have nothing whatever to do in this case. The only order mentioned in the Information is the order made by Secretary Root in January, 1903, and then the Information sets forth the various extensions of time within which the alterations should be made, and which the offers just made by the Government tend to establish. Now, I suppose that far they have a right to go,

to show the extensions; but further, I don't see how it is rele-
111 vant to the inquiry here. The charge is that we have failed to comply with the order of the Secretary of War in 1903, as extended by his successor in office, and the only question here, it seems to me, is whether we have obeyed that order or not. I don't see that the action of Secretary Taft, as set forth in that offer, becomes relevant to the case.

By the COURT: I don't know whether this case will ultimately become a question of law for the Court or a question of fact for the jury, but I will overrule the objection to this paper; it need not be read, however, at present, until I am better advised.

To which rule counsel for defendant excepts, and exception noted.

Counsel for the Government offer, as Exhibit 10, a certified copy of a petition of certain corporations and companies in and about Pittsburgh to the Secretary of War, dated August, 1902, setting forth certain facts in relation to the Union Bridge Company; this
112 offer to be followed by the offer of certified copies of endorsements made thereon by the Secretary of War and others, for the purpose of showing a compliance by the Secretary of War with Section 18 of the River and Harbor Act of March 3rd, 1899, before making the final order requiring the Union Bridge Company to alter said bridge.

Mr. MCCLEAVE: With what provision of the 18th Section do you think this tends to show a compliance on the part of the Secretary of War?

Mr. DUNKLE: For a hearing, and the preliminaries leading up to it.

Objected to by counsel for defense, as incompetent and irrelevant, and not tending to support the offer.

Mr. DUNKLE: We are offering this simply for the purpose of showing the proceedings leading up to the order of the Secretary of War. That is not intelligent at all without all this record. This is the whole record under which the Secretary of War acted, and
113 without all of this record going in it is not intelligible. We don't want it for any purpose except simply to show that the Secretary of War complied with that Act by giving a public hearing and giving the notice in accordance therewith.

Mr. MCCLEAVE: * * * This petition to the Secretary of War doesn't in any way tend to show that he conformed with the provisions of the Act, because there is no such thing required or specified in the Act. The steps to be followed under the Act are clearly set forth therein. The Act is complied with if he sets forth a good reason, as he does in the order, and has a hearing.

Objections overruled and exceptions to defendant.

Offer read.

Counsel for the Government offer, as Exhibit No. 11, certified copy of the second endorsement of the Chief of Engineers U. S. A.,
114 by H. T. Hodges of the Corps of Engineers, dated September 23, 1902, referring said petition to Capt. W. F. Sibert for report.

Offer objected to by counsel for defense, as incompetent and irrele-

vant, there being no power given under the Act to the Secretary of War to refer or to subdelegate his power to any officer under him; and for the further reason that this is the allegation of power by a subaltern in the War Department at Washington undertaking to delegate powers under the Act of March 3, 1899, to Maj. W. L. Sibert, without any authority therefor contained in the Act.

By Mr. DUNKLE: This is an Act of Brigadier General Gillespie signed by Hodges, the War Department doing all their business in that way. In other words, the hearing there was not a judicial hearing, but simply by that department.

By Mr. MCCLEAVE: The objection to that is that the Act doesn't give any Brigadier General any power whatever with respect
115 to the facts occurring before the order.

Objection overruled and exception noted to defense.

Counsel for Government offer in evidence, as Exhibit No. 12, certified copy of the 3rd endorsement, or preliminary report of W. L. Sibert, dated October 13, 1902, together with sheets 1, 2 and 3, accompanying and being a part of said report.

By the COURT: I felt, when I looked over the previous paper, that I admitted all of those endorsements. If you are going on to offer each one of those endorsements, they may as well all be included in the one offer.

By Mr. DUNKLE: The Government will then offer the endorsement No. 3, being preliminary report of William L. Sibert, dated October 13, 1902, together with sheets 1, 2 and 3, accompanying and being a part of said report;

116 Also certified copy of the 4th endorsement, or report of G. L. Gillespie, Chief of Engineers of U. S. A., to the Secretary of War, dated October 16, 1902;

Also certified copy of the 5th endorsement, or approval of the Secretary of War, dated October 18, 1902;

Also certified copy of the 6th endorsement of the Chief of Engineers U. S. A., by A. McKenzie, Colonel Corps of Engineers, dated October 23, 1902, referring same to Capt. Sibert for further report;

Also certified copy of the 7th endorsement, of William L. Sibert, Captain Corps of Engineers, to the Chief of Engineers of the U. S. A., without date;

Also certified copy of the 8th endorsement, report of Chief of Engineers U. S. A. by G. L. Gillespie, Brigadier General Chief of Engineers, to Secretary of War, dated December 16th, 1902; this completing the list of endorsements.

By Mr. MCCLEAVE: As I understand it, with the exception
117 of the last, all of these proceedings were had without any knowledge on the part of the Union Bridge Company.

By Mr. DUNKLE: The Union Bridge Company was notified after the Seventh endorsement.

Counsel for defendant object to the offer as a whole, for the reason, first, that it is incompetent and irrelevant; second, that none of the proceedings set forth in the endorsements were had with notice to or with the knowledge of the Union Bridge Company.

By the COURT: What I want to get on the record is the fact as to when the Union Bridge Company got a notice.

By Mr. DUNKLE: We will come to that. That is not included in these endorsements.

By the COURT: Have you any objection to stating it?

118 By Mr. DUNKLE: Certainly not. On November 4th, 1902, it was served on the Union Bridge Company.

By the COURT: It being stated by counsel at bar that the Union Bridge Company had notice of the proceedings on November 4th, 1902, we simply admit the proceedings prior to that date in order to show what was done and the various steps taken in the proceedings, the effect of which proceedings will be considered and ruled upon hereafter, but for the present the objections are overruled and exception noted to defendant.

Counsel for the U. S. Government offers in evidence, as Exhibit 13, certified copy of report of William L. Sibert to the Chief of Engineers U. S. A., referred to in the Seventh Endorsement, dated December 8th, 1902, together with all exhibits, to wit, A, B, C, D and E, accompanying said report.

119 Objected to by counsel for defense, as incompetent and irrelevant, and for the further reason that it doesn't show that the Union Bridge Company had any notice of a hearing before Maj. Sibert or the Secretary of War.

By Mr. DUNKLE: This is to be followed by evidence of notice of a hearing to the Union Bridge Company.

By Mr. MCCLEAVE: Well, shouldn't that come first?

Mr. DUNKLE: I have these offers in the order in which I think they should come.

By the COURT: Does that report show that the Union Bridge Company appeared at the hearing before Maj. Sibert?

By Mr. DUNKLE: Yes, sir; it shows that they appeared by counsel, and that the officers of the Bridge Company appeared by the President.

120 By Mr. MCCLEAVE: Well, that is a mere allegation by Maj. Sibert. That is not competent to show that. I think we should first insist on having the notice to the Union Bridge Company, because the date of that is very material in reference to these proceedings.

By Mr. DUNKLE: That is my next offer. I will offer that notice.

By the COURT: We will then have the offer of the notice in connection with this offer.

By Mr. DUNKLE: We now offer, as Exhibit 14, certified copy of notice to the Union Bridge Company of a hearing, as required by the Act of March 3rd, 1899, signed by authority of the Secretary of War, William L. Sibert, Captain Corps of Engineers, which said notice was served on the Union Bridge Company by J. W. Arras, November 4th, 1902, as sworn to by him.

121 By Mr. MCCLEAVE: Is that offered for the purpose of showing that the Union Bridge Company on that day had notice?

By Mr. DUNKLE: Yes; on the day of the service.

Offer objected to by counsel for defense, as incompetent and irrelevant, for the purpose offered.

By Mr. DUNKLE: Well, we offer it for the purpose of showing, as we have stated in the offer, a compliance by the Secretary of War with the Act, and as part of the proceedings leading up to the final notice.

By Mr. MCCLEAVE: But that doesn't meet the objection. The Act required notice to be served on the Bridge Company. The only competent proff I think is to show that notice was actually served.

By the COURT: Did the Bridge Company appear at this
122 hearing?

By Mr. MCCLEAVE: As a matter of fact, they did, and objected to the jurisdiction. But it is not competent to prove that by these papers. That is a question of fact to be proved by witnesses.

By Mr. DUNKLE: The Bridge Company did appear by attorney and by officers of the Bridge Company, and an adjournment was taken, at their request, for two weeks, and they appeared at that second hearing; never objected to the jurisdiction.

By Mr. MCCLEAVE: That may be true, but this isn't the way to prove it.

Objection overruled to the offer of these two exhibits, 13 and 14, and exception noted to defendant.

By Mr. DUNKLE: There are two of the plats referred to in
123 Major Sibert's preliminary report, numbers 2 and 3, are not attached; my offer was to include plats 1, 2 and 3; but we have the originals here from Washington, and a party here who has charge of the records, by whom we desire to prove plats 2 and 3 attached to Major Sibert's report; plat No. 1 being certified to by the Secretary of War.

SARSFIED A. MCCARTHY, a witness called on behalf of the U. S. Government, being duly sworn, testified as follows:

Direct examination by Mr. DUNKLE:

Q. Where do you reside?

A. In Washington City.

Q. How long have you lived there?

A. All my life.

Q. What, if any, position do you hold there in the War Department?

A. A clerk in the office of the Chief of Engineers.

Q. What are your duties and what do you have charge of in the office there?

A. Charges of the index and of the files.

Q. You have charge of the papers that are filed in the
124 War Department, have you?

A. In the office of the Chief of Engineers of the War Department.

Q. Are you acquainted with the record relating to the proceedings of the Union Bridge Company?

A. Yes, sir.

Q. I show you a copy that has been admitted in evidence of a report of Capt. William L. Sibert, dated October 13, 1902, in which he refers to sheets 1, 2 and 3 in his report. State whether you have sheet No. 2 of that report?

A. I have sheet No. 2.

Q. State whether or not that is the original sheet No. 2 filed with Major Sibert's report in the office of the Secretary of War at Washington?

A. This is sheet No. 2, accompanying Major Sibert's reports.

Q. That is the original sheet?

A. Yes, sir.

Q. State whether or not you have sheet No. 3 referred to in Major Sibert's report?

A. I have the sheet referred to.

Q. State whether or not that is the original sheet No. 3 referred to in Major Sibert's report to the War Department?

125 A. This is the sheet referred to in Major Sibert's report of October, 1902.

Counsel for the Government now offer in evidence sheets Nos. 2 and 3, identified by the witness as the originals.

Objected to by counsel for defense, for the reason that the preparation of these sheets was a mere *ex parte* proceeding on the part of said Engineer of the War Department, and without notice to the Union Bridge Company a-d without giving to said Company any opportunity whatever to be heard in respect thereto.

By the COURT: For the present, the objections are overruled, the effect of these papers to be considered hereafter, and an exception may be noted to defendant.

Mr. DUNKLE:

Q. I now refer to the report of Capt. Sibert made December 8, 1902, in which he refers to Exhibits A, B, C, D and E.

126 State whether or not you have any of those original Exhibits in that case, and, if so, what?

A. I have the original report.

Q. You have Major Sibert's original report?

A. Yes, sir.

Q. We have a certified copy of that in evidence, but we don't have the exhibits.

A. I have Exhibit D of that report, and also Exhibit B, and Major Sibert's report of December 8, 1902, all originals.

Q. What are Exhibits D and B?

A. Exhibit D consists of three photographs, one tracing and three blue prints.

Q. And what is Exhibit B?

A. Exhibit B consists of a number of papers, blue prints and maps, together with blue prints which are folded in.

Counsel for the Government now offer in evidence these exhibits containing the maps and photographs.

Counsel for defense asks the purpose of the offer.

127 Mr. DUNKLE: They are offered simply for the purpose of completing the report of Major Sibert.

By Mr. MCCLEAVE: Now I submit to your Honor that when you look at these they certainly have no relevancy to this case. As to the photographs, one is a picture of a bridge with a big steamboat on one side throwing out an immense lot of smoke; and another is a blue print entitled "Section aft of the pilot house, suitable packet for the Alleghany River"; another is entitled, "Model for light river tow boat built by Monongahela Consolidated Coal & Coke Co."; another one had big letters on it "Vesta," called a model pool tow boat built by the Jones & Laughlin Steel Company, Limited; and I don't see what materiality or relevancy either of these pictures or maps can have to the controversy here, and they are therefore objected to, as incompetent and irrelevant.

128 By Mr. DUNKLE: We simply offer them for the purpose of showing that there was a hearing before the War Department. This is part of what came before Major Sibert at that hearing, and is part of his report and referred to in his report, and we couldn't offer the report without offering the whole of it; and it is simply offered for the purpose of showing the hearing contemplated by the Act.

By the COURT: We will make the same ruling as made with reference to the preceding offer, and note an exception to the defendant.

By Mr. MCCLEAVE: Exhibit B is objected to, as immaterial and irrelevant; it consisting in part of Mr. Ferguson's brief on behalf of the river people, and the balance being made up of letters addressed by various parties to Capt. Sibert.

By Mr. DUNKLE: These papers are not offered independently, but simply as a part of the whole record, and going to make the record in this case.

129 By the COURT: The objection to the admission of these papers is overruled, and the Exhibit is received in connection with the offer of Exhibit 13, in order to complete the report of W. L. Sibert; the effect of such report and exhibits to be passed upon hereafter.

Exception noted *to* defendant.

W. L. SIBERT, recalled on behalf of the Government.

Direct examination by Mr. DUNKLE:

Q. I think you stated, Major, that you are acquainted with the location of the Union Bridge?

A. I did.

Q. Were you acquainted with the condition and location of the bridge on January 20, 1903?

A. I was.

Q. And are you acquainted with the condition of the bridge at this time?

A. I am.

Q. State whether or not there have been any changes made in the Union Bridge in regard to its height*h* or any other way?

A. No material change has been made to the bridge; none
130 affecting its height*h* or width of span, or, generally speaking, the riprapping around the piers. Of course that is a thing that sometimes is damaged by the ice and it is replaced; but, generally speaking, the conditions of the bridge are the same now as they were before. At some time there has been a new roof put on the bridge since this question came up, but the exact time I don't know; but there has been no material change in the bridge since.

Q. Has there been any change in relation to any of the changes included in the notice of the Secretary of War—made by the Union Bridge Company?

A. No.

Q. You say there have been no changes complying with the order?

A. None of the changes ordered by the Secretary of War in the order to which you refer have been made.

Q. You refer to the order of January 20, 1903?

A. I do.

Q. I call your attention to Exhibit 3, and ask whether you served that notice?

A. I did personally serve this notice on James M. Bailey, President of the Union Bridge Company.

131 Q. At what time?

A. On the 26th day of January, 1903.

Q. Are you familiar with the Allegheny River?

A. I am.

Q. Do you know where it rises?

A. It rises in the State of Pennsylvania.

Q. It flows through what states?

A. It flows through the State of New York, and back into Pennsylvania.

Q. State whether or not you know of your own knowledge that the river is navigable in the states of Pennsylvania and New York?

A. It is.

Q. State whether or not you were the party directed by the Secretary of War to hold this hearing in relation to this bridge?

A. I was directed by the Secretary of War to hold a hearing in the case of the Union Bridge Company concerning a complaint made that the same unreasonably obstructed navigation.

Q. State whether or not you did hold that hearing?

A. I did.

Q. State who appeared for the Union Bridge Company?

132 A. Its President, James W. Bailey; and it was also represented by attorney W. B. Rodgers.

Q. State how long that hearing continued?

A. I can't state that exactly without referring to the record. It continued as long as either party——

Objected to by counsel for defense, as immaterial and irrelevant

By the COURT: I don't see that the length of the hearing has anything to do with the matter.

By Mr. DUNKLE: We will withdraw the question. The records will show that.

J. W. ARRAS, a witness called on behalf of the United States Government, being duly sworn, testified as follows:

Direct examination by Mr. DUNKLE:

Q. Where do you reside?

A. At Coraopolis.

133 Q. That is where, in this County?

A. Yes, sir; about eleven miles below Pittsburgh on the Ohio River.

Q. What official position do you hold?

A. Assistant Engineer.

Q. How long have you been assistant engineer?

A. Since 1887.

Q. Located here in Pittsburgh?

A. Yes, sir.

Q. State whether you are acquainted with the location of the Union Bridge?

A. I am.

Q. Where is that located?

A. At the mouth of the Allegheny River.

Q. Were you acquainted with the condition of the Union Bridge on the 20th of January, 1903?

A. Yes, sir; generally.

Q. And are you acquainted with it now, at this time?

A. Yes, sir.

Q. State whether or not there has been any change in the height or width of span of the bridge since January 20th, 1903?

A. There has not been.

134 Q. I now show you Exhibit 14, being a notice to the Union Bridge Company, and ask you whether you served that notice?

By the COURT: When is that notice dated?

By Mr. DUNKLE: The notice itself is not dated, but the service is dated November 3rd, 1902.

Q. State whether or not you served that notice?

A. Yes; I served the original, of which this is a copy.

Q. On whom did you serve it?

A. On Mr. James M. Bailley, as President of the Union Bridge Company.

Q. On what date did you serve it?

A. On the 3rd day of November, 1902.

No cross-examination.

Plaintiff rests.

Court here took a recess until 12 o'clock P. M.

135 *Testimony on Behalf of the Defendant.*

Court reconvened at 2 o'clock P. M.
Counsel for defendant made no opening remarks to the jury.

HENRY M. LONG, called on behalf of defense, being duly sworn, testified as follows:

Direct examination by Mr. RODGERS:

Q. What is your business or occupation?
A. Stock broker.
Q. And you live in Allegheny County?
A. Yes, sir.
Q. How long have you lived in Allegheny County?
A. Seventy years this fall; born here.
Q. And that is all your life?
A. All my life.
Q. Were connected with the Union Bridge at the time of its construction?
A. I was.
Q. What was your connection with that company?
A. I was the Second President of it; the first President
136 only remained two or three months, and I succeeded him.
Q. Then do you know when the bridge was constructed?
A. Yes, sir.
Q. When was it constructed?
A. It was constructed in the fall of '73 until the fall of '74.
Q. When was it completed?
A. Completed in the fall of 1874.

No cross-examination.

A. L. SCHULTZ, a witness called on behalf of defense, being duly sworn, testified as follows:

Direct examination by Mr. MCCLEAVE:

Q. Do you reside in Pittsburgh?
A. Yes, sir.
Q. What is your business?
A. Bridge engineer.
Q. What experience have you had as an engineer in bridge construction?
A. Since 1874.
137 Q. And where has been your experience principally?
A. Throughout this county and state and the United States.
Q. Are you familiar with the order of the Secretary of War to the Union Bridge Company dated January 20th, 1903?
A. Yes, sir.
Q. I show you a paper that has been offered in evidence here by the Government and marked Exhibit 3, which purports to be an

order, and I ask you if that is the order which you have had before you previously, or a copy of it?

A. Yes, sir.

Q. Have you made yourself acquainted with the present Union Bridge crossing the Allegheny River near its mouth?

A. I have.

Q. Have you made an investigation of that bridge with a view to ascertaining the cost to the bridge company of a reconstruction of the bridge in accordance with the specifications set forth in that order?

A. I have.

Q. What would a reconstruction as proposed in that order cost?

138 Mr. BETTINGER: We object to the question; it doesn't make any difference, in our view of the case, what it would cost. That is not a question that is now involved. The sole question that is involved is, whether or not the defendants have complied with the lawful order of the Secretary of War.

By Mr. MCCLEAVE: I propose to prove by the witness on the stand that a compliance with the order of the Secretary of War necessarily requires, as a matter of construction, the utter demolition of the present structure as it exists; that no part of it, piers or superstructure, can be utilized in the reconstruction of the bridge as required, and that the cost of such reconstruction in accordance with the order of the Secretary of War of January 20, 1903, would not be less than the sum of $450,000.

By Mr. BETTINGER: I don't think it is proper to state the amount of the costs in the presence of the jury.

139 Mr. MCCLEAVE: And that cost exclusive of the land damages resulting from the elevation of the structure.

By Mr. BETTINGER: I move that so much of the statement of counsel for defendant as states the amount of the cost, and the latter statement which he made, as to what it does not include, be stricken from the record.

By the COURT: Well, we couldn't strike it from the minds of the jury. We will overrule the objection and allow the testimony to go in, and note an exception to the plaintiff.

A. About $459,325, exclusive of any land damages occasioned by the approaches on either side of the bridge and along the two streets.

Mr. MCCLEAVE:

Q. In such reconstruction as required by the order, what part, if any, of the present structure could be used?

140 A. Not any of it.

Q. And that answer, as I understand you, includes the piers and the present superstructure.

A. The new piers interfere with the old piers, and must be so very much higher that you can't incorporate the old piers in.

Q. So then, as I understand you, it would require new piers for the whole length of the bridge?

A. Yes, sir.

Q. Then how does the elevation required—just as a physical

thing—affect the land on the Allegheny side of the river where the bridge lands?

A. It requires a viaduct or an elevated structure to run out from the end of the bridge to the corresponding street.

Q. What is the elevation of that viaduct with respect to the property abutting on the street?

Mr. BETTINGER: Without objecting to each particular question, I would like to object to this line of examination, and, to save time, let one objection do for all of these questions.

141 By the COURT: Well, I think it is pretty much expressed in the offer they have made.

Question withdrawn.

No cross-examination.

Counsel for the bridge Company offers in evidence all of the Acts of Congress of the United States respecting or relating to the Alleghany River; this for the purpose of showing that at the time of the erection of this bridge, Congress had passed no Acts assuming jurisdiction over the Alleghany River.

Counsel for the Government objects to this wholesale offer, without designation of the particular laws.

By the COURT: We will have to have what we are ruling on.

Mr. MCCLEAVE: How else can I show that this happened?

142 By the COURT: Does the Government contend that there was any Act bearing on this river before this bridge was built?

Mr. BETTINGER: I think not, your Honor.

Mr. MCCLEAVE: If that is the understanding, then I waive the offer.

By the COURT: Well, if there is any such law called to our attention, we will give you an opportunity to put that law in evidence.

Mr. MCCLEAVE: Our position of course is that there is no law.

By the COURT: Then how can you offer in that negative way?

Mr. MCCLEAVE: To prove the negative, I offer all the Acts, to show that there is none.

143 Mr. BETTINGER: So that we may thoroughly understand each other——

By the COURT: It is sufficient to say that I have no offer of any Act of Congress before me.

By Mr. BETTINGER: Well, I don't wish to be understood as saying that there has never been any Act of Congress passed that may not affect the Alleghany River. I said I don't remember of any. Yet it may be that the Act authorizing the construction of the Davis Island Dam, may have some effect on the Alleghany River, and I don't want to be concluded by that statement. Or, there may be similar acts like that, and I don't want to be concluded from their use if there should be any.

It is understood that counsel agrees that the Court shall take judicious notice of any legislation pertaining to this case.

Defendant rests.

144 Mr. BETTINGER: We don't want this record to show that eighteen months was not a reasonable time, or that that claim was waived. We are prepared to prove that it was, and tendered that proof.

By the COURT: We will permit you to tender the proof.

Mr. BETTINGER: We haven't the witnesses here at this moment. We did have them here this morning. But we tender this proof now, that eighteen months' notice was a reasonable time.

By the COURT: What do you tender?

Mr. BETTINGER: We offer testimony to prove by expert witnesses that the time fixed by the Secretary of War within which these alterations or removals should be made was a reasonable time; we offer to show this by Mr. Swenson and Mr. Lain, two expert engineers.

145 Offer objected to by counsel for defense, as not rebuttal.

Mr. BETTINGER: That is not a situation in which we should be placed. We offered the testimony this morning, and had the witness on the stand, and the testimony was objected to, presumably because that would be waived. That is the way I understood it. Then your Honor stated that if they did offer evidence that it was not a reasonable time, we then might need it.

By the COURT: There having been no question raised by defendant's proofs as to the reasonableness of the time allowed for the execution of this order and its extension, we do not regard the question of the reasonableness of the time as entering into the case under the proofs, and the objection is therefore sustained, and an exception noted to the plaintiff.

Testimony closed.

146 It was agreed by counsel for respective parties and the Court, that, as the case had resolved itself into simply questions of law, there being no disputed facts for the determination of the jury, that the arguments of counsel should be confined to a discussion of the legal points presented.

Counsel for the defendant presented the following points:

(1.) That in the absence of any legislation by the Congress of the United States assuming jurisdiction over the Allegheny River, the power of the State of Pennsyivanla to authorize the construction of any bridges that it might see fit, including the Union Bridge over the Allegheny River, was plenary; and such erection having been made under and by the State authority, the bridge is a lawful structure and the private property of the Bridge Company.

(2.) The attempt in the present proceedings upon the part of the United States to compel a reconstruction or removal of the Union bridge erected under the authority of the State of Pennsyl-
147 vania, is only referable to the 18th Section of the River and Harbor Bill of the Congress of the United States, approved March 3, 1899.

(3.) The said 18th Section of the River and Harbor Bill of the Congress of the United States, approved March 3rd, 1899, is null and void, for the following reasons:

(*a.*) That said Act attempts to take and destroy the private property of the Union Bridge Company, without the process of law.

(*b.*) The said act undertakes to authorize the taking of private property for public use without just compensation.

(*c.*) In and by the terms of the said act, it is undertaken by the Congress of the United States to unlawfully delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army, both legislative and judicial powers, in contravention of the Constitution of the United States.

(4.) The Union Bridge having been erected across the Alleghany River prior to the enactment of any legislation of the Congress of the United States assuming jurisdiction over the said river, and
148 having, as erected, been maintained and used by the said bridge Company and the public at large, with the consent and acquiescence of the State of Pennsylvania, and without interference or complaint of any of the authorities of the United States until the beginning of these proceedings, the said bridge is a lawful structure and cannot be taken by the United States, either by way of requiring a reconstruction of the same or removal of the said bridge, without making just compensation to the Union Bridge Company therefor.

(5.) That said Act of Congress makes it the duty of the Secretary of War, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge, to wit, the bridge complained against, so to alter the same as to render navigation through or under it reasonably free and unobstructed, and, in giving such notice, he shall specify the changes recommended by the Chief of Engineers that are required to be made and shall prescribe in each case a reasonable time in which to make them. Under this, the Secretary of War was required affirmatively by the act to give to the Union Bridge
149 Company, owning the bridge in controversy in this case, opportunity to be heard by him, the said Secretary of War, before he was authorized or lawfully empowered to give the notice to the said Company to so alter the bridge in requirement with his order, and it appearing affirmatively in the case that the said Elihu Root, the Secretary of War, in making the order set forth in the information, never at any time gave the Union Bridge Company reasonable opportunity to be heard before him, or any hearing whatsoever, the order set forth in the information, given and signed by the said Elihu Root, then Secretary of War, is not a lawful order, and is null and void and not authorized by the said Act.

(6.) There is no evidence in the case that the Union Bridge is or at any time was and unreasonable obstruction to the navigation of the Allegheny river.

These points were discussed by Mr. McCleave on behalf of the defendant and by Mr. Bettinger on behalf of the plaintiff, during which discussion Court adjourned until Thursday, January 11, 1906, at 9:30 A. M.

150 And now Thursday, January 11, 1906, at 9:30 A. M., Mr. Bettinger resumed his argument in opposition to defend-

ant's points, followed by Mr. McCleave in reply, said argument closing at noon.

Counsel for the United States Government presented the following points:

First. By Section 18 of the Act of March 3, 1899 (30 St. 1153) Congress placed upon the Secretary of War the duty of determining whether or not bridges over navigable water ways of the United States were obstruction to the navigation of such water ways. In case he complied with the requirements of the law in regard to a hearing, and fixed a reasonable time for the completion of the prescribed alterations, his notice to alter the Union Bridge, set forth in the Information filed at above number and term, was a lawful notice, and the failure to alter said bridge in accordance with said order, or to remove the said structure, if continued
151 during the month of July, A. D. 1905, constituted the misdemeanor charge in the Information; and though the defendant originally built said Union Bridge under color of authority of an Act of Assembly of the State of Pennsylvania, and even though the requirements of that Act of Assembly were strictly observed by said Union Bridge Company in constructing said bridge, such Act of Assembly would not constitute a valid defense to the Information.

2. The c-st of making the alterations prescribed by the Secretary of War in his notice to the Union Bridge Company, set forth in the Information and offered in evidence, or the cost of the removal of the Union Bridge, is not a valid defense to the charge of failing to obey such order, in the absence of testimony showing the removal of the bridge, or the inability of the Union Bridge Company to remove it within the period fixed by the said notice.

3. Section 18 of the Act of March 3, 1899, directs the Secretary of War to give the parties in interest, to wit, the bridge owners,
152 a reasonable opportunity to be heard, prior to issuing a final notice to said bridge owners, to make the alternations deemed necessary by him in order to render the bridge under consideration not an obstruction to the free navigation of the river spanned by it. Such hearing need not be held by the Secretary of War in person; and it is sufficient under the provisions of the Act if the Secretary of War had given said owners an opportunity to be heard relative to the proposed alterations, before one or more of his agents or subordinates, and the testimony or statements made at said hearing have been transmitted to and considered by said Secretary of War.

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Charge of the Court—Hon. Jos. Buffington, J.

GENTLEMEN OF THE JURY: You have been qualified here as jurors to pass upon the issues of fact involved in this case. It is an information brought by the United States against the Union Bridge

Company, charging it with wilfully failing or refusing to comply with a lawful order of the Secretary of War; and it is alleged on the part of the Government that such refusal constitutes a misdemeanor under the 18th Section of the Act of Congress of March 3, 1899, and subjects the defendant to the fines and penalties provided therein.

At the conclusion of the testimony in the case, counsel for both sides agreed that there were no questions for the determination of this jury, but that the ultimate issue of the case depended on the views of the Court on the law governing it. It has therefore
154 seemed proper to us, in order to dispose of the case, that we should direct you to find a verdict of guilty in manner and form as the defendant stands indicted and to return a verdict to that effect. This we do, without at present passing finally upon the questions of law involved. This course will enable the Court to decide those questions later and put them in such shape that the case can be reviewed by a higher Court.

The Union Bridge Company is a corporation of the State of Pennsylvania. It built this bridge over the Allegheny River in pursuance of the powers conferred upon it by its charter granted by the State. The Secretary of War, in pursuance of the powers vested in him by an Act of Congress, has notified the Bridge Company, after hearing the parties, that this bridge is an obstruction to navigation, and has ordered it to be altered, so as to avoid its being an obstruction to navigation.

On the part of the Government it is contended that this is a lawful order of the Secretary of War, and, for present purposes, we instruct you that it is.

155 Upon the part of the defendant it is contended that this is not a lawful order of the Secretary of War, and that he is not justified under the Act, which they claim is unconstitutional, in issuing or making any such order, and that especially in view of the fact that the Act in question provides for no compensation to the defendant.

Upon these questions we express no present view. That is a matter for our later determination; and this will be raised by a motion on the part of the Government asking the Court to impose sentence under this verdict, and the questions raised by the defendant in this case will come before the Court upon a motion in arrest of judgment. This course, as we have said, will enable the Court, at its convenience, to review these very important questions.

Counsel for both sides have submitted points upon which they ask us to instruct you. For the present we will, *pro forma,* affirm the points presented by the Government, and, *pro forma,* refuse
156 those of the defendant, and will reserve the right to specifically answer each of these several points hereafter, and to make the answers to such points and our opinion, which we will hereafter file, a part of a present charge.

Under these instructions, therefore, gentlemen of the jury, it will be your duty to return a verdict finding the defendant in this case guilty in manner and form as it stands indicted.

—— ——.

Counsel for defendant ask for an exception to that part of the charge wherein the Court instructed the jury that the Secretary of War found the bridge to be an unreasonable obstruction, and after a hearing of the parties.

Counsel for defendant also except to the refusal of the Court to affirm defendant's points.

Exceptions noted.

Counsel for defendant also except to the affirmance of the Government's points.

157 [Endorsed:] United States District Court, Western District of Pennsylvania. No. 1, October Term, 1905. Criminal Docket. *In re* United States *vs.* The Union Bridge Co. Testimony taken before Jury and Charge of the Court to Jury. D. Filed Jan. 11, 1906.

158 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
vs.
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Information.

Motion for Judgment.

And, now, January 11, 1906, comes John W. Dunkle, United States Attorney, and moves for judgment in the above-entitled case.

159 [Endorsed:] No 1, October Term, 1905. U. S. District Court. The United States of America *vs.* The Union Bridge Company. Motion for Judgment. D. Jan'y 11. John W. Dunkle, U. S. Attorney. Filed Jan. 11, 1906.

160 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
vs.
THE UNION BRIDGE COMPANY.

Counsel for the United States prays the Court to instruct the Jury as follows:—

First. By Section 18 of the Act of March 3, 1899 (30 St. 1153) Congress placed upon the Secretary of War the duty of determining

whether or not bridges over navigable waterways of the United States were obstructive to the navigation of such water-ways. In case he complied with the requirements of the law in regard to a hearing, and fixed a reasonable time for the completion of the prescribed alterations, his notice to alter the Union Bridge, set forth in the Information filed at above number and term, was a lawful notice, and the failure to alter said bridge in accordance with said order, or to remove the said structure, if continued during the month of July, A. D. 1905, constituted the misdemeanor charged in the Information; and though the defendant originally built said Union Bridge under color of authority of an Act of Assembly of the State of Pennsylvania, and even though the requirements of that Act of assembly were strictly observed by said Union Bridge Com-
161 pany in constructing said bridge, such Act of Assembly would not constitute a valid defense to the Information.

162 2. The cost of making the alterations prescribed by the Secretary of War in his notice to the Union Bridge Company, set forth in the Information and offered in evidence, or the cost of the removal of the Union Bridge, is not a valid defense to the charge of failing to obey such order, in the absence of testimony showing the removal of the bridge, or the inability of the Union Bridge Company to remove it within the period fixed by the said notice.

163 3. Section 18 of the Act of March 3, 1899, directs the Secretary of War to give the parties in interest, to wit, the bridge owners, a reasonable opportunity to be heard, prior to issuing a final notice to said bridge owners, to make the alterations deemed necessary by him in order to render the bridge under consideration not an obstruction to the free navigation of the river spanned by it. Such hearing need not be held by the Secretary of War in person; and it is sufficient under the provisions of the Act if the Secretary of War has given said owners an opportunity to be heard relative to the proposed alterations, before one or more of his agents or subordinates, and the testimony or statements made at said hearing have been transmitted to and considered by said Secretary of War.

164 [Endorsed:] In the District Court of the United States for the Western District of Pennsylvania. No. 1, October Term, 1905. Criminal Docket. The United States of America *vs.* The Union Bridge Company. Government's Points. D. John W. Dunkle, U. S. Attorney. Filed Jan. 11, 1906.

165 In the District Court of the United States for the Western District of Pennsylvania.

No. —, —— Term, 1905.

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Counsel for the defendant prays the court to instruct the jury as follows:

First. That in the absence of any legislation by the Congress of the United States, assuming jurisdiction over the Allegheny River, the power of the State of Pennsylvania to authorize the construction of any bridges that it might see fit, including the Union Bridge over the Allegheny River, was plenary; and such erection having been made *made* under and by the State authority, the bridge is a lawful structure and the private property of the Bridge Company.

Second. The attempt in the present proceedings upon the part of the United States to compel a reconstruction or removal of the Union Bridge, erected under the authority of the State of Pennsylvania, is only referable to the eighteenth section of the River and Harbor Bill of the Congress of the United States, approved March 3rd, 1899.

Third. The said eighteenth section of the River and Harbor Bill of the Congress of the United States, approved March 3rd, 1899, is null and void for the following reasons:

(*a.*) The said act attempts to take and destroy the private property of the Union Bridge Company without due process of
166 law.

(*b.*) The said act undertakes to authorize the taking of private property for public use without just compensation.

(*c.*) In and by the terms of the said act, it is undertaken by the Congress of the United States to unlawfully delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army, both legislative and judicial powers, in contravention of the Constitution of the United States.

Fourth. The Union Bridge having been erected across the Allegheny River, prior to the enactment of any legislation of the Congress of the United States assuming jurisdiction over the said river, and having, as erected, been maintained and used by the said Bridge Company and the public at large with the consent and acquiescence of the State of Pennsylvania and without interference or complaint of any of the authorities of the United States until the beginning of these proceedings, the said bridge is a lawful structure and cannot be taken by the United States, either by way of requiring a reconstruction of the same or removal of the said bridge, without making just compensation to the Union Bridge Company therefor.

Fifth. The said Act of Congress makes it the duty of the Secretary of War, first giving the parties reasonable opportunity to be heard,

to give notice to the persons or corporations owning or controlling such bridge, to-wit, the bridge complained against, so to alter the same as to render navigation through or under it reasonably
167 free and unobstructed, and in giving such notice, he shall specify the changes recommended by the Chief of Engineers that are required to be made and shall prescribe in each case a reasonable time in which to make them. Under this, the Secretary of War was required affirmatively by the act to give to the Union Bridge Company, owning the bridge in controversy in this case, opportunity to be heard by him, the said Secretary of War, before he was authorized or lawfully empowered to give the notice to the said Company to so alter the bridge in requirement with his order, and it appearing affirmatively in the case that the said Elihu Root, the Secretary of War, in making the order set forth in the information, never at any time gave the Union Bridge Company reasonable opportunity to be heard before him, or any hearing whatsoever, the order set forth in the information, given and signed by the said Elihu Root, then Secretary of War, is not a lawful order and is null and void and not authorized by the said act.

W. B. RODGERS.
McCLEAVE & WENDT.

6. There is no evidence in the case that the Union Bridge is or at any — was an unreasonable obstruction to the navigation of the Allegheny River.

168 [Endorsed:] No. 1 October Term 1905 Criminal Docket United States *vs.* Union Bridge Co. Points for def's D. Filed Jan'y 11th, 1906 Wm. F. Lindsey Clerk. Rodgers, McCleave & Wendt. Filed: Jan. 11, 1906.

169 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES
vs.
THE UNION BRIDGE COMPANY.

Order for Talesmen.

And, now, to wit, January 9, 1906, it appearing to the Court, from the statement of the United States Marshal, that Joseph I. Brown, a petit juryman empaneled to determine the said cause, is by reason of sickness, and Isaac Wall, likewise empaneled, by reason of absence, not present, and that there is not a petit jury to determine said cause.

It is ordered, that the Marshal or his deputy, shall return jurymen from the by-standers sufficient to complete the panel.

Per Curiam.

170 [Endorsed:] In the District Court of the United States for the Western District of Pennsylvania. No. 1 October Term, 1905 The United States of America, *vs.* The Union Bridge Company. Order for Talesmen. D. Filed: Jan. 9, 1906.

171 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

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And, now, to wit, January 9, 1906, comes Robert M. Gibson, Assistant U. S. Attorney, and states to the Court that through inadvertence he had interlined in his own handwriting, near the bottom of page 3 of the original information in this case, the following words: "At the time said hearing was held, to wit, the 14th day of November, A. D. 1902 and continuously thereafter up to and including the 31st day of July, A. D. 1905, the said Union Bridge was owned and controlled by said Union Bridge Company."

He further states that his intention at the time was to insert the foregoing sentence in an office copy of said original information. He therefore moves the Court for permission to cross out or erase said sentence so interlined.

Whereupon, counsel for defendant consenting, permission is given said Assistant U. S. Attorney to cross out or erase said interlineation. *Per Curiam.*

172 [Endorsed:] In the District Court of the United States, for the Western District of Pennsylvania. No. 1 October Term, 1905. United States of America *vs.* Union Bridge Company. Order. D. Filed: Jan. 9, 1906.

Form No. 145.

173 *Præcipe for Subpœna in a Case.*

In the District Court, United States, Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES
vs.
UNION BRIDGE COMPANY.

The Clerk of said Court will issue Subpœna for the following-named persons to appear before said Court at the United States Court

Rooms, in Pittsburg, at 9:30 o'clock, A. M., on the 10th day of January 1906, then and there to testify in behalf of the United States.

Name.	Residence.
John Evans.....	7713 Mulford St., near Brushton Ice House, East End, Pittsburgh, Pa.

This 9th day of January, 1906.

JOHN W. DUNKLE,
U. S. Attorney.

174 [Endorsed:] No. 1. Oct. 1905. United States District Court Western District of Pennsylvania. No. 1 October Term. 1906. The United States *vs.* Union Bridge Co. No. 1 Oct. Term, 1905. Præcipe for Subpœna on the part of the United States for John Evans D. Filed this 9" day of Jan. 1906. Issued Jan. 9, 1906.

Form No. 145.

175 *Præcipe for Subpœna in a Case.*

In the District Court, United States, Western District of Pennsylvania.

No. —.

THE UNITED STATES
vs.
UNION BRIDGE COMPANY.

The Clerk of said Court will issue Subpœna for the following-named persons to appear before said Court, at the United States Court Rooms, in Pittsburgh, Pa., at 10 o'clock, A. M., on the 9th day of January 1906, then and there to testify in behalf of the United States.

Names.	Residence.
Emil Swenson,	Frick Bldg., Pittsburgh, Pa.
Herman Laub,	Lewis Bldg., 6th & Smithfield, Pittsburgh, Pa.

This 8 day of January, 1906.

JOHN W. DUNKLE,
U. S. Attorney.

176 [Endorsed:] United States District Court Western District of Pennsylvania. No. 1 October Term, 1905. The United States *vs.* Union Bridge Company. Præcipe for Subpœna on the part of the United States for Herman Laub Emil Swenson. D. Filed this 8 day of Jan., 1906. Wm. T. Lindsey, Clerk. Issued Jan. 8, 1906.

Form No. 149

177 *Præcipe for Witnesses Before Court Jury, Western District of Pennsylvania.*

The Clerk of the United States District Court will issue subpœna for—

Names.	Residence.
L. P. Chester,	509 Coal St., Wilkinsburg.
James McCluskey,	Conastoga Bldg., Pittsburg.
Capt. Warren Elsey,	with Jones & Laughlin, Pittsburg.
Thomas Rees,	"
J. L. McFeeters,	"
Nelson Stevens,	"
Jas. A. Henderson,	"
T. P. Roberts,	"
H. C. Gould,	"
W. D. Fairchilds,	"
Wm. L. Sibert,	"

2.

to appear before said court at Pittsburg, on the 9th day of January, 1906, at 10 o'clock, A. M., to testify before the court, and generally on behalf of the United States. In case of United States *vs.* Union Bridge Co.

This sixth day of January, 1906.

JOHN W. DUNKLE,
U. S. Attorney.

178 [Endorsed:] No. 1. Oct. Term 1905. Criminal. District Court United States; Western District of Penna. October Term, 1905. Præcipe for Witnesses to Testify before Grand Jury. D. United States *vs.* Union Bridge Co. D. Filed Jan. 6, 1906. Wm. T. Lindsey, Clerk.

179 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
v.
THE UNION BRIDGE COMPANY, a Corporation.

Notice of Petition for Leave to Amend.

To William B. Rodgers, Esq., Johns McCleave, Esq., of Counsel for Union Bridge Company.

GENTLEMEN: Please take notice that I shall, on the 4th day of January, A. D. 1906, at 10 A. M. or as soon thereafter as I may be heard, move the United States District Court for the Western Dis-

trict of Pennsylvania to allow the amendment of the Information filed in said Court at the above number and term, as follows:

By the addition of the sentence: 'At the time said hearing was held, to wit, the 14th day of November, A. D. 1902, and continuously thereafter up to and including the 31st day of July, A. D. 1905, the said Union Bridge was owned and controlled by the
180 said Union Bridge Company,' said sentence being inserted immediately after the sentence ending, near the foot of page 3 of the Information, as follows: "appeared and contested the further proceeding in the matter," and just preceding the sentence beginning "A report of said hearing."

And also by striking out the following sentence, beginning near the middle of page 7 of Information: "Yet so it is that at the end of the period fixed by aforesaid notice to alter said "Union Bridge," and at the date to which said time for the completion of said alteration had been extended by the Secretary of War, to wit, the first day of January, A. D. 1905, the said alteration was not made and has not since been made; but to make the same the said Union Bridge Company hath wilfully failed, refused and neglected, to wit, for the period aforesaid, thereby wilfully failing and refusing to comply with the said lawful order of the Secretary of War, contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States," and by the insertion in its place of the following sentence:

Yet so it is, that at the end of the period fixed by the aforesaid notice to alter said "Union Bridge," and at the date to which said time for the completion of said alteration had been extended by the Secretary of War, to wit, the 1st day of January, A. D. 1905, the said alteration was not made; but to make the same the said Union Bridge Company hath failed, refused and neglected, to wit, for the period aforesaid, thereby wilfully failing and refusing to comply with the said lawful order of the Secretary of War.

181 And it is further alleged that the said Union Bridge Company has remained in default, as aforesaid, for and during the month of July, A. D. 1905, and has wilfully failed, refused and neglected to comply with the said lawful order of the Secretary of War, contained in the notice hereinbefore set forth, by failing, refusing and neglecting, for and during said month, to make the changes specified in said notice, and has owned, controlled and maintained said "Union Bridge" over said Allegheny River during said month of July, A. D. 1905, the same being then and there obstructive to the free navigation of said river in the particulars hereinbefore set forth, contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

JOHN W. DUNKLE,
U. S. Attorney, W. Dist. of Pa.

Jan. 3, 1905.

182 And, now, to wit, January —, 1906, I hereby accept service of the foregoing notice.

——— ———,
Of Counsel for Union Bridge Company.

183 [Endorsed:] No. 1 October Term, 1905. In the District Court of the United States, for the Western District of Pennsylvania. The United States of America *vs.* The Union Bridge Company, a Corporation. Notice of Petition for Leave to Amend. D. Served this 3d Jan'y 1906. Johns McCleave. John W. Dunkle, U. S. Attorney. Filed: Jan. 4, 1906.

184 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
v.
THE UNION BRIDGE COMPANY, a Corporation.

Notice of Petition for Leave to Amend.

To William B. Rodgers, Esq., Johns McCleave, Esq., of Counsel for Union Bridge Company.

GENTLEMEN: Please take notice that I shall, on the 4th day of January, A. D. 1906, at 10 A. M. or as soon thereafter as I may be heard, move the United States District Court for the Western District of Pennsylvania to allow the amendment of the Information filed in said Court at the above number and term, as follows:

By the addition of the sentence: "At the time said hearing was held, to wit, the 14th day of November, A. D. 1902, and continuously thereafter up to and including the 31st day of July, A. D. 1905, the said Union Bridge was owned and controlled by the said
185 Union Bridge Company,' said sentence being inserted immediately after the sentence ending, near the foot of page 3 of the Information, as follows: "appeared and contested the further proceeding in the matter," and just preceding the sentence beginning "A report of said hearing."

And also by striking out the following sentence, beginning near the middle of page 7 of Information: "Yet so it is that at the end of the period fixed by aforesaid notice to alter said "Union Bridge," and at the date to which said time for the completion of said alteration had been extended by the Secretary of War, to wit, the first day of January, A. D. 1905, the said alteration was not made and has not since been made; but to make the same the said Union Bridge Company hath wilfully failed, refused and neglected, to wit, for the period aforesaid, thereby wilfully failing and refusing to comply with the said lawful order of the Secretary of War, contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States," and by the insertion in its place of the following sentence:

Yet so it is, that at the end of the period fixed by the aforesaid notice to alter said "Union Bridge," and at the date to which said time for the completion of said alteration had been extended by

the Secretary of War, to wit, the 1st day of January, A. D. 1905, the said alteration was not made; but to make the same the said Union Bridge Company hath failed, refused and neglected, to wit, for the period aforesaid, thereby willfully failing and refusing to comply with the said lawful order of the Secretary of War.

186 And it is further alleged that the said Union Bridge Company has remained in default, as aforesaid, for and during the month of July, A. D. 1905, and has wilfully failed, refused and neglected to comply with the said lawful order of the Secretary of War, contained in the notice hereinbefore set forth, by failing, refusing and neglecting, for and during said month, to make the changes specified in said notice, and has owned, controlled and maintained said "Union Bridge" over said Allegheny River during said month of July, A. D. 1905, the same being then and there obstructive to the free navigation of said river in the particulars hereinbefore set forth, contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

JOHN W. DUNKLE,
U. S. Attorney, W. Dist. of Pa.

Jan. 3, 1905.

187 And now, to wit, January —, 1906, I hereby accept service of the foregoing notice.

W. B. RODGERS,
Of Counsel for Union Bridge Company.

188 [Endorsed:] No. 1, October Term, 1905. In the District Court of the United States for the Western District of Pennsylvania. The United States of America *vs.* The Union Bridge Company, a Corporation. Notice of Petition for Leave to Amend. D. John W. Dunkle, U. S. Attorney. Filed Jan. 4, 1906.

189 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
v.
THE UNION BRIDGE COMPANY, a Corporation.

Amended Information.

And now, to wit, January 4th, A. D. 1905, comes John W. Dunkle, United States Attorney for the Western District of Pennsylvania, and, by permission of the Court, amends the Information filed at above number and term, as follows:

The sentence: At the time said hearing was held, to wit, on the 14th day of November, A. D. 1902, and continuously thereafter

up to and including the 31st day of July, A. D. 1905, the said "Union Bridge" was owned and controlled by the said Union Bridge Company, is added to said Information, being inserted immediately after the sentence, ending near the foot of page 3 of the Information as follows: "appeared and contested the further proceeding in the matter," and just before the sentence beginning, at foot of page last aforesaid, as follows: "A report of said hearing."

And by striking out the following sentence, beginning near the middle of page 7 of Information: "Yet so it is that at the end of the period fixed by aforesaid notice to alter said
190 "Union Bridge," and at the date to which said time for the completion of said alteration had been extended by the Secretary of War, to wit, the first day of January, A. D. 1905, the said alteration was not made and has not since been made; but to make the same the said Union Bridge Company hath wilfully failed, refused and neglected, to wit, for the period aforesaid, thereby wilfully failing and refusing to comply with the said lawful order of the Secretary of War, contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States," and by the insertion in its place of the following sentences:

Yet so it is, that at the end of the period fixed by the aforesaid notice to alter said "Union Bridge," and at the date to which said time for the completion of said alteration had been extended by the Secretary of War, to wit, the 1st day of January, A. D. 1905, the said alteration was not made; but to make the same the said Union Bridge Company hath failed, refused and neglected, to wit, for the period aforesaid, thereby wilfully failing and refusing to comply with the said lawful order of the Secretary of War.

And it is further alleged that the said Union Bridge Company has remained in default, as aforesaid, for and during the month of July, A. D. 1905, and has wilfully failed, refused and neglected to comply with the said lawful order of the Secretary of War, contained in the notice hereinbefore set forth, by failing, refusing and neglecting, for and during said month, to make the changes specified in said notice, and has owned, controlled and main-
191 tained said "Union Bridge" over said Allegheny River during said month of July, A. D. 1905, the same being then and there obstructive to the free navigation of said river in the particulars hereinafter set forth, contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

JOHN W. DUNKLE,
U. S. Attorney, W. Dist. of Penn'a.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

William L. Sibert, being first duly sworn, deposes and says that he is an officer of the Engineer Corps of the United States Army, and is at present located at Pittsburgh, in the Western District of

Pennsylvania, and has under his supervision matters pertaining to the navigation of the Allegheny River; that he has read the foregoing amended Information, and that the allegations therein contained are true, and he verily believes.

WILLIAM L. SIBERT.

Subscribed and sworn to before me, this 3rd day of January, A. D., 1906, at Pittsburgh, Pa.

WM. T. LINDSEY,
Clerk U. S. District Court, W. D. of Pa.

192 [Endorsed:] No. 1 October Term, 1905. In the District Court of the United States, for the Western District of Pennsylvania. The United States of America, *vs.* The Union Bridge Company, a Corporation. Amended Information. D. John W. Dunkle, U. S. Attorney. Filed: Jan. 4, 1906.

193 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
vs.
THE UNION BRIDGE COMPANY, a Corporation.

Petition for Amendment of Information.

And, now, to wit, January 4th, 1906, comes the United States of America, by John W. Dunkle, United States Attorney for the Western District of Pennsylvania, and moves the Court for permission to amend the Information filed in the above-entitled case, as follows:

By the addition of the sentence: "At the time said hearing was held, to wit, the 14th day of November, A. D. 1902, and continuously thereafter up to and including the 31st day of July, A. D. 1905, the said Union Bridge was owned and controlled by the said Union Bridge Company,' said sentence being inserted immediately after the sentence ending, near the foot of page 3 of the Information, as follows: "appeared and contested the further proceeding in the matter," and just preceding the sentence beginning, "A report of said hearing."

And also by striking out the following sentence, beginning near the middle of page 7 of Information: "Yet so it is that at the end of the period fixed by aforesaid notice to alter said "Union
194 Bridge," and at the date to which said time for the completion of said alteration had been extended by the Secretary of War, to wit, the first day of January, A. D. 1905, the said alteration was not made and has not since been made; but to make the same the said Union Bridge Company hath wilfully failed, refused

and neglected, to wit, for the period aforesaid, thereby wilfully failing and refusing to comply with the said lawful order of the Secretary of War, contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States," and by the insertion in its place of the following sentences:

Yet so it is, that at the end of the period fixed by the aforesaid notice to alter said "Union Bridge," and at the date to which said time for the completion of said alteration had been extended by the Secretary of War, to wit, the 1st day of January, A. D. 1905, the said alteration was not made; but to make the same the said Union Bridge Company hath failed, refused and neglected, to wit, for the period aforesaid, thereby wilfully failing and refusing to comply with the said lawful order of the Secretary of War.

And it is further alleged that the said Union Bridge Company has remained in default, as aforesaid, for and during the month of July, A. D. 1905, and has wilfully failed, refused and neglected to comply with the said lawful order of the Secretary of War, contained in the notice hereinbefore set forth, by failing, refusing and neglecting, for and during said month, to make the changes specified in said notice, and has owned, controlled and maintained said
195 "Union Bridge" over said Allegheny River during said month of July, A. D. 1905, the same being then and there obstructive to the free navigation of said river in the particulars hereinbefore set forth, contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States."

The foregoing amendment to the original Information filed at the aforesaid number and term of this Court is prayed for, in order that the allegations of said Information setting forth the cause of action may be made more full, formal and precise.

JOHN W. DUNKLE,
U. S. Attorney, W. Dist. of Pa.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

John W. Dunkle, United States Attorney, being duly sworn, deposes and says that the allegations set forth in the foregoing petition are true, to his personal knowledge.

JOHN W. DUNKLE.

Sworn and subscribed before me this 2nd day of January, A. D. 1905.

WM. T. LINDSEY,
Clerk, U. S. Dist. Court, W. D. of Pa.

196 Counsel for the Union Bridge Company, the defendant, hereby consents that the Court shall make an order allowing the amendment of the Information, herein prayed for.

——— ———,
——— ———,
Counsel for Union Bridge Company.

197 [Endorsed:] No. 1. October Term, 1905. In the District Court of the United States, for the Western District of Pennsylvania. The United States of America, *vs.* The Union Bridge Company, a Corporation. Petition for Amendment of Information. D. And now, to wit, January 4, 1906, the within amendments allowed as prayed for. *Per Curiam.* John W. Dunkle, U. S. Attorney. Filed: Jan. 4, 1906.

198 No. 1, October Term, 1905.

UNITED STATES
v.
THE UNION BRIDGE COMPANY.

Form No. 149.

Præcipe for Witnesses Before Grand Jury.

Western District of Pennsylvania.

The Clerk of the United States District Court will issue subpœna for—

Names. Residence.
The Secretary of War, Washington, D. C.

To bring with him all petitions, endorsements, orders, reports, maps, plans, exhibits, and all papers on file in the War Department touching and concerning the "Union Bridge," over the Allegheny River, between the cities of Pittsburgh and Allegheny, ordered to be changed and altered by notice of the Secretary of War to The Union Bridge Company, dated January 20, 1903.

to appear before said court at Pittsburgh, on the 9th day of January, 1906, at 10 o'clock, A. M., to testify before the grand jury, and generally on behalf of the United States.

This 2nd day of January, 1906.

JOHN W. DUNKLE,
U. S. Attorney.

199 [Endorsed:] # 1, Oct. Term, 1905. Crim. Docket. District Court United States, W. District of Penna. October Term, 1906. Præcipe for Witnesses to Testify before Grand Jury. D. United States *v.* Union Bridge Company, a Corporation. Filed Jan. 2, 1906. Wm. T. Lindsey, Clerk. Issued ——, 1—.

200 *Blank—General Order.*

RULE 14 (*d*). All papers must be so endorsed as to disclose the general contents thereof; and all orders, decrees and rules to show cause submitted to the court by counsel must be prepared so that when served they will of themselves be self-explanatory.

In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

The President of the United States to the Marshal of the Western District of Pennsylvania, Greeting:

We command you that you cause the Union Bridge Company to come before our District Court of the United States for the Western District of Pennsylvania on the 16th day of October next, there to answer the United States of America of a certain information charging said Union Bridge Company with unlawfully failing and refusing to make certain alterations to a bridge owned and maintained by said Company through the month of July A. D. 1905, to-wit: the Union Bridge over the Allegheny River, a navigable stream, in the County of Allegheny and Western District of Pennsylvania, said alterations having been theretofore recommended by the Chief of Engineers and specified and lawfully ordered by the Secretary of War to be completed within a certain reasonable period, and thus willfully failing and neglecting to comply with the said lawful order of said Secretary of War contrary to the provisions of Section 18 of the Act of Congress, approved March 3, 1899; and have you then and there this writ.

[Seal of U. S. District Court, W. D. Pennsylvania.]

Witness my hand and seal of said Court, at the City of Pittsburgh, this 27th day of September, A. D. 1905.

WM. T. LINDSEY, *Clerk.*

201 No. 1, Oct. T., 1905. (Crim. Docket.) United States District Court, Western District of Pennsylvania. United States of America *vs.* The Union Bridge Co. Writ of *venire facias ad respondendum.* D. Rule 14 requires indorsement of all papers. 2026. Filed Sept. 29, 1905.

28th Sept., /05. Service accepted.

W. B. RODGERS
Att'y for Def't.

Pittsburgh, Pa., September 28, 1905. Service of the within writ accepted for the Union Bridge Company by W. B. Rodgers, Esq., their attorney.

So ans.

STEPHEN P. STONE,
U. S. Marshal,
By GEO. S. OWENS, *Deputy.*

Service, $2.00.

202 In the District Court of the United States for the Western District of Pennsylvania.

THE UNITED STATES
vs.
THE UNION BRIDGE COMPANY.

And, now, to wit, September 26, 1905, upon motion of John W. Dunkle, United States Attorney, it is hereby ordered that a writ of *venire facias ad respondendum* upon the above-named defendant, the Union Bridge Company, issue, calling upon it to appear upon the first day of the coming October Term of this Court, being the third Monday of October, to make answer to the Information filed.
Per Curiam.

203 [Endorsed:] # 1 Oct. T., 1905. Criminal Docket. In the District Court of the United States for the Western District of Pennsylvania. The United States, *vs.* The Union Bridge Company. Order for process. D. Filed: Sept. 27, 1905.

204 In the District Court of the United States for the Western District of Pennsylvania.

No. —, —— Term, 1905.

THE UNITED STATES OF AMERICA
vs.
THE UNION BRIDGE COMPANY, a Corporation.

Information.

Be it remembered that John W. Dunkle, Attorney of the United States for the Western District of Pennsylvania, who for the United States in this behalf prosecutes, in his own person comes here into the District Court of the United States for said Western District of Pennsylvania, on the twenty-seventh day of September, in the year of our Lord one thousand nine hundred and five, in said term, and for the United States gives the Court here to understand and be informed that the Union Bridge Company is a corporation existing under the laws of the State of Pennsylvania, having its principal office in the City of Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania; that on the first day of July, A. D. 1905, and from thence until the thirty-first day of July, A. D. 1905, both inclusive, at and within the County of Allegheny and District aforesaid, and within the jurisdiction of this Court, said Union Bridge Company owned and controlled a certain bridge across the Allegheny River at or near the mouth of said
205 river where it joins the Monongahela River to form the Ohio River, said Allegheny River being a waterway of the United

States, having its source in the State of New York, and being navigable in said State of New York and in said Western District of Pennsylvania. The said bridge, commonly known and designated as the "Union Bridge," during the month of July, A. D. 1905, was, and thenceforth and now still is, owned and controlled by said Union Bridge Company, and then was and now still is an unreasonable obstruction to the free navigation of said Allegheny River for the reason that it is of insufficient height above said River, that the width of each of its spans, from pier to pier supporting its superstructure, is insufficient, and that it has certain riprapping about each of said piers.

And for a particular statement of said obstruction your informant shows that the clear height under said bridge, at that stage of low water in said river commonly known and designated as "Pool Stage, Davis Island Dam," (the elevation of the water surface being about seven hundred and three feet above tide water,) is only about thirty-six feet, and that during the highest water stage of said river the clear height under said bridge is only about nine feet; that said bridge is composed of five spans, each span having a clear width of only about two hundred and three feet; and that said bridge has four piers built in said river, about each of which, and existing as a component part of it, is placed certain riprapping, to wit, riprapping extending a distance of about thirty feet on each side of each of said piers at a height above an elevation of ten feet below the surface of said "Pool stage, Davis Island Dam"; whereby the
206 navigation of said river is greatly obstructed by said bridge.

And your informant gives the Court to understand and to know that the Secretary of War of the United States, being advised of the facts aforesaid, and having good reason to believe that the said bridge was an unreasonable obstruction to the free navigation of said river, gave notice to said Union Bridge Company to so alter the said bridge as to render navigation through and under it reasonable, free, easy and unobstructed. And your informant states that the Secretary of War, before giving the said notice to alter said bridge hereinafter particularly set forth, gave the said Union Bridge Company reasonable opportunity to be heard touching the premises aforesaid, to wit, the said Secretary of War, before giving said notice, directed William L. Sibert, then Captain, Corps of Engineers, United States Army, through the Chief of Engineers, United States Army, to hold a public hearing, after due notice to all interested parties, relative to the question of whether or not said bridge should be altered in the particulars set forth in the notice from the Secretary of War to the said Union Bridge Company, hereinafter recited; and in pursuance of said direction of the Secretary of War, said William L. Sibert, Captain, Corps of Engineers, after due notice to said Union Bridge Company, among others, entered into a hearing, for the purpose aforesaid, on the 14th day of November, A. D. 1902, at Pittsburg, Pennsylvania, at which hearing, as well as at the various adjournments of said hearing from time to time, said Union Bridge Company, by its President and by counsel, appeared and contested the further proceeding in the matter. A report of

said hearings, with the statements thereat made, was duly
207 forwarded to the Secretary of War, through the Chief of Engineers, United States Army, by said William L. Sibert.

After having given said Union Bridge Company a reasonable opportunity to be heard, as aforesaid, the Secretary of War gave said Union Bridge Company notice to alter said "Union Bridge," a copy of said notice being as follows, to wit:

208 WAR DEPARTMENT,
WASHINGTON CITY, *January* 20, 1903.

To the Union Bridge Company, Pittsburg, Pennsylvania.

Take notice that—

Whereas, The Secretary of War has good reason to believe that the bridge of the Union Bridge Company, a corporation existing under the laws of the State of Pennsylvania, across the Allegheny River, and connecting the cities of Pittsburg and Allegheny, Pennsylvania (said bridge being known as the Union Bridge), is an unreasonable obstruction to the free navigation of the said Allegheny River (which is one of the navigable waterways of the United States) on account of insufficient height and width of span, and of wide and high riprapping at the piers;

And Whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation under it reasonably free, easy, and unobstructed, to wit:

Alter said bridge so as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second span from the Pittsburg shore to give a clear headroom over the Davis Island pool of not less than 70 feet; and the first span from the same shore to give a clear headroom of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed.

And Whereas, Eighteen (18) months from the date of
209 service of this notice is a reasonable time in which to alter the said bridge as described above;

Now Therefore, In obedience to, and by virtue of, section eighteen of an Act of the Congress of the United States entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, I, Elihu Root, Secretary of War, do hereby notify the said Union Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before the expiration of eighteen months from the date of service hereof.

ELIHU ROOT,
Secretary of War.

210 And in said notice the said Secretary of War specified the changes required to be made in said bridge in order to render it not an obstruction to the navigation of said Allegheny River, the method of changing said bridge, specified by said Secretary of War, so as to render navigation through and under it reasonable, free, easy and unobstructed, being as follows:

Alter said bridge so as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second span from the Pittsburg shore to give a clear headroom over the Davis Island pool of not less than 70 feet; and the first span from the same shore to give a clear headroom of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed.

The said changes to said bridge, set forth by the Secretary of War in said notice to said Union Bridge Company, had, prior to the issuance of said notice, been recommended to said Secretary of War by the Chief of Engineers of the United States Army as being required in order that navigation under said bridge might be rendered free, easy and unobstructed.

And your informant further gives the Court to know that the said Secretary of War in and by said notice prescribed a reasonable time in which to make said changes, to wit, fixed and declared that the alteration to said bridge hereinbefore particularly set forth and specified, should be completed on or before the expiration of eighteen months from the date said notice should be served upon said Union Bridge Company. And informant shows that said notice was duly served upon said Union Bridge Company in accordance with

211 the laws of the State of Pennsylvania, on the 26th day of January, A. D. 1903, at Pittsburg aforesaid, a copy thereof having been personally delivered to James M. Bailey, then President of said Union Bridge Company. The time, at, or before which said alteration of said bridge should be completed, as ordered by the Secretary of War in aforesaid notice, to wit, the 26th day of July, A. D. 1904, was from time to time extended by the Secretary of War, at the prayer of said Union Bridge Company, the first day of January, A. D. 1905, beng finally prescribed by the Secretary of War as the date at or before which aforesaid alteration should be completed. And your informant alleges that said period of eighteen months, from the 26th day of January, A. D. 1903, which period was extended as aforesaid was full, ample and reasonable time in which to make the changes ordered in the notice hereinbefore set forth. Yet so it is that at the end of the period fixed by aforesaid notice to alter said "Union Bridge," and at the date to which said time for the completion of said alteration had been extended by the Secretary of War, to wit, the first day of January, A. D. 1905, the said alteration was not made and had not since been made; but to make the same the said Union Bridge Company hath wilfully failed, refused

and neglected, to wit, for the period aforesaid, thereby wilfully failing and refusing to comply with the said lawful order of the Secretary of War, contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

Wherefore the said Attorney of the United States, who prosecutes as aforesaid for the United States, prays the consideration of
212 the Court here in the premises, and that due process of law may be awarded against the said Union Bridge Company in this behalf that the said Union Bridge Company make answer to the said United States concerning the premises aforesaid.

JOHN W. DUNKLE,
U. S. Attorney, W. Dist. of Pa.

213 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

William L. Sibert, being first duly sworn, deposes and says that he is an officer of the Engineer Corps of the United States Army, and is at present located and stationed at Pittsburg, in the Western District of Pennsylvania, and has under his supervision matters pertaining to the navigation of the Allegheny River; that he has read the foregoing information and application for process, and that the allegations therein contained are true to his personal knowledge.

WM. L. SIBERT,
Major of Engineers, U. S. Army.

Subscribed and sworn to before me, this 26" day of August, A. D. 1905.

WM. T. LINDSEY,
Clerk U. S. District Court, W. D. of Pa.

214 [Endorsed:] In the District Court of the United States, for the Western District of Pennsylvania. No. 1 October Term, 1905. Crim. Docket. The United States of America, *vs.* The Union Bridge Company, a Corporation. Information. D. And now 9th Jan. 1906 Def't pleads not guilty. Johns McCleave, W. B. Rodgers, Att'ys for Def't. John W. Dunkle, U. S. Attorney. Filed: Sept. 27, 1905.

215 In the District Court of the United States for the Western District of Pennsylvania.

No. 21, October Term, 1905.

THE UNITED STATES OF AMERICA
vs.
THE UNION BRIDGE COMPANY, a Corporation.

To the Attorneys for the above-named defendant:

You are hereby notified that the rule to show cause why an information should not be filed against said defendant in the above-

entitled case heretofore granted will be called for argument on Tuesday, the 19th day of September, 1905, at ten o'clock A. M., or at such time thereafter as the Court may designate.

Respectfully, JOHN W. DUNKLE,
United States Attorney.

Pittsburgh, September 7, 1905.

216 [Endorsed:] Service accepted 7th Sept. 1905. W. B. Rodgers for Union Bridge Co.

217 In the District Court of the United States for the Western District of Pennsylvania.

No. 21, October Term, 1905.

THE UNITED STATES OF AMERICA
vs.
THE UNION BRIDGE COMPANY, a Corporation.

To the Attorneys for the above-named defendant:

You are hereby notified that the rule to show cause why an information should not be filed against said defendant in the above-entitled case heretofore granted will be called for argument on Tuesday, the 19th day of September, 1905, at ten o'clock A. M., or at such time thereafter as the Court may designate.

Respectfully, JOHN W. DUNKLE,
United States Attorney.

Pittsburgh, September 6, 1905.

218 [Endorsed:] # 1 Oct. T., 1905. Crim. Doc. United States District Court, Western District of Pennsylvania. United States *vs.* Union Bridge Co. Served this 6th Sept. 1905. Johns McCleave. Proof of notice of rule to show cause why information should not be filed. D. Filed: Sept. 27, 1905.

219 In the District Court of the United States for the Western District of Pennsylvania.

THE UNION STATES
vs.
THE UNION BRIDGE COMPANY.

And, now, September 27, 1905, rule to show cause why information should not be filed made absolute and information ordered filed. *Per Curiam.*

220 [Endorsed:] # 1 Oct. T., 1905. Criminal Docket. In the District Court of the United States, for the Western District of Pennsylvania. The United States, *vs.* The Union Bridge Company. Ordered D. Filed: Sept. 27, 1905.

221 In the District Court of the United States for the Western District of Pennsylvania.

No. —, October Term, 1905.

THE UNITED STATES OF AMERICA
vs.
THE UNION BRIDGE COMPANY, a Corporation.

And now 22d August, 1905, comes The Union Bridge Company and says that the information in manner and form suggested should not be allowed for the following reasons:

1. The Government has no authority for preferring information or indictment except by the terms of the Act of Congress of March 3rd, 1899.

2. The only offence under said Act is the failure by the Bridge Company to comply with the order of the Secretary of War requiring the reconstruction or alteration of the bridge.

3. The bridge was erected under the authority of the State of Pennsylvania in the year 1874 at a cost of $310,000, many years before the Congress of the United States had assumed or exercised any jurisdiction over the Allegheny River.

4. The said Act, which is the only basis for the proposed information, is null and void in this:

222 (*a*) It does not provide any judicial inquiry as to the nature of the obstruction and, as a matter of fact, no judicial inquiry has been had.

(*b*) By its terms the United States do not provide compensation to the Bridge Company for the cost of the alteration required and as a matter of fact do not propose to provide for or make such compensation.

UNION BRIDGE CO.,
By JOS. FORD, *Secretary.*

STATE OF PENNSYLVANIA, *County of Allegheny, ss:*

Joseph Ford, Secretary of The Union Bridge Company, being duly sworn according to law, deposes and says that the facts set forth above are true as he verily believes.

JOS. FORD.

Sworn to and subscribed before me this 22 day of August, 1905.
WM. T. LINDSEY, *Clerk.*

223 [Endorsed:] No. 21, October Term, 1905. The United States of America, *vs.* The Union Bridge Company, a Corporation. Answer. (Copy.) Filed Aug. 22, 1905. William B. Rodgers, Johns McCleave, Att'ys for Defendant.

224 *Blank—General Order.*

RULE 14 (*d*). All papers must be so endorsed as to disclose the general contents thereof; and all orders, decrees and rules to show cause submitted to the court by counsel must be prepared so that when served they will of themselves be self-explanatory.

In the District Court of the United States for the Western District of Pennsylvania.

No. 2, Oct. T., 1905.

THE UNITED STATES OF AMERICA
vs.
THE UNION BRIDGE COMPANY, a Corporation.

Motion for Rule to Show Cause.

And, now, to wit, August eighth, 1905, comes John W. Dunkle, United States Attorney for the Western District of Pennsylvania, and moves the Court for a rule upon the Union Bridge Company, a corporation existing under the laws of the state of Pennsylvania, having its principal office in the City of Pittsburgh, County of Allegheny and the Western District of Pennsylvania, to show cause why an information should not be filed by said United States Attorney in the District Court of the United States for the Western District of Pennsylvania, against said Union Bridge Company, charging it with maintaining and operating in the County of Allegheny and District aforesaid, during the month of July A. D. 1905, a certain bridge over the Allegheny River, a navigable water-way of the United States, in violation of the provisions of Section 18 of the River and Harbor Act, approved March 3, 1899.

JOHN W. DUNKLE,
U. S. Attorney, West. Dist. of Penna.

And now, to-wit, August 8, 1905, rule granted as within prayed, returnable August 23, 1905. Above rule to be served upon defendant not later than ten days before return day.

Per Curiam.

[Seal of U. S. District Court, W. D. Pennsylvania.]

From the Record.

WM. T. LINDSEY, *Clerk.*

225 [Endorsed:] No. 2 Oct. T. 1905. (Civil Docket.) United States District Court, Western District of Pennsylvania. The United States of America *vs.* The Union Bridge Company. Certified Copy of Motion for Rule. Rule 14 requires indorsement of all papers. D. 2026. Filed Aug. 11, 1905. John W. Dunkle, U. S. Att'y.

Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA, *Western District of Penna., ss:*

I hereby certify and return that I served the annexed Motion for Rule to Show Cause and Copy of Information on the therein-named The Union Bridge Company by handing to and leaving a true and attested copy thereof with Edward Ford, Secretary of said Bridge Company personally at Pittsburg in said District on the 10th day of August, A. D. 1905.

STEPHEN P. STONE,
U. S. Marshal.
By W. M. HENRY, *Deputy.*

Service	$2.00
Mileage	12
	2.12

226 In the District Court of the United States for the Western District of Pennsylvania.

No. —, —— Term, 1905.

THE UNITED STATES OF AMERICA
vs.
THE UNION BRIDGE COMPANY, a Corporation.

Motion for Rule to Show Cause.

And, now, to wit, August eighth 1905, comes John W. Dunkle, United States Attorney for the Western District of Pennsylvania, and moves the Court for a rule upon the Union Bridge Company, a corporation existing under the laws of the State of Pennsylvania, having its principal office in the City of Pittsburgh, County of Allegheny and Western District of Pennsylvania, to show cause why an information should not be filed by said United States Attorney in the District Court of the United States for the Western District of Pennsylvania, against said Union Bridge Company, charging it with maintaining and operating, in the County of Allegheny and District aforesaid, during the month of July, A. D. 1905, a certain bridge over the Allegheny River, a navigable water-way of the United States, in violation of the provisions of Section 18 of the River and Harbor Act approved March 3, 1899.

JOHN W. DUNKLE,
U. S. Attorney, West. Dist. of Penna.

227 [Endorsed:] No. 1 October Term 1905. Criminal Docket. In the District Court of the United States, for the Western

District of Pennsylvania. No. — October Term, 1905. The United States of America, *vs.* The Union Bridge Company. Motion for Rule. D. C. Arg. And now, to wit, August 8–1905, rule granted as within prayed, returnable August 23, 1905. Above rule to be served upon defendant not later than ten days before return day. *Per Curiam.* John W. Dunkle, U. S. Attorney. Filed Aug. 8, 1905.

228 *Docket Entries.*

October Term, 1905.

1.

THE UNITED STATES
vs.
THE UNION BRIDGE COMPANY, ALLEGHENY.

August 8, 1905, motion of the United States Attorney for a rule on the said defendant, a corporation under the laws of the State of Pennsylvania to show cause why an information should not be filed against it in said court by the United States Attorney, charging it with maintaining and operating in said district a bridge over the Allegheny River, a navigable highway of the United States in violation of Section 18 of the R. & H. Act, approved March 3, 1899, presented in open Court and filed; and rule granted as prayed returnable on the 23rd instant; service thereof to be made not later than ten days before return day and copy of motion and rule issued. August 11, 1905, certified copy of motion for rule with Marshal's return thereon, showing service of same on Edward Ford, Secretary of said Bridge Company, filed. August 22, 1905, answer filed. September 27, 1905, on motion of John W. Dunkle, United States Attorney, and proofs (2) of notice of said rule filed, order made making said rule absolute and directing that an information be filed. Same day, information filed. Same day, on motion of John W. Dunkle, United States Attorney, order made that a writ of *venire facias ad respondendum* issue, returnable the third Monday of October. Same day, said writ issued. September 24, 1905, said writ, with Marshal's return thereon, showing acceptance of service of same by defendant's attorney, filed. October 18, 1905, by leave of Court, motion to quash information and reasons therefor filed. Same day, this cause came on to be heard, and a jury being called, came, viz: Joseph Barclay, L. O. C. Mahaffey, R. Morris Smith, Samuel Higgenbotham, W. A. Wallace, Joseph T. Brown, A. L. G. Hay, Isaac Wall, J. L. Barber, David A. Scott, Darwin P. Wright, and Thomas Hart, twelve *and* good — lawful men of the Western District of Pennsylvania, who were duly summoned, returned and empanelled. Same day, on motion of attorney for defendant, the United States Attorney assenting, trial continued to January 9, 1906, at which time said jury to report before said Court at Pittsburgh, in said district, provided the U. S. Marshal shall, in the meantime, notify them,

the said jurors, to appear. January 3, 1906, on præcipe filed subpœna (1) issued. January 4, 1906, petition for amendment of information and amended information and notices of petition for leave to amend presented and filed, and counsel for defendant being present, and on motion of John W. Dunkle, U. S. Attorney, order made allowing said amendments. January 6, 1906, on præcipe filed, subpœnas (2) issued. January 8, 1906, on præcipe filed, subpœna (1) issued. January 9, 1906, on præcipe filed, subpœna (1) issued. Same day, this cause, having been continued from October Term, 1905 for trial at this date, came on for trial, and the defendant's attorneys stating that they withdraw motion for order to quash complaint herein and enter plea of *non cul et de hoc* &c. U. S. Attorney similiter &c. Issue and the jury heretofore summoned and empanelled herein, was called. And it appearing to the Court in the statement of the Marshal that Joseph I. Brown and Isaac Wall, heretofore empanelled herein, are not present by reason of sickness and otherwise and that there is not a petit jury to determine said cause, order made that the Marshal or his deputy return from
229 the bystanders sufficient to complete the panel. And the jury now being called, came, viz: Joseph Barclay, L. O. C. Mahaffey, R. Morris Smith, Samuel Higgenbotham, W. A. Wallace, A. L. G. Hay, T. L. Barber, David A. Scott, Darwin P. Wright, Thomas Hart, J. C. Martin and William Marchand, twelve good and lawful men of the Western District of Pennsylvania, who, having been duly summoned, returned and empanelled, were sworn to try the issue herein joined. Same day, on motion of Robert M. Gibson, Assistant United States Attorney, and on consent of counsel for defendant, order made permitting him to cross out or erase certain interlineations inadvertently made by him near the bottom of page three of the original information herein. January 10, 1906, trial proceeds. Same day, case closed and arguments on points of law submitted. January 11, 1906, on agreement of counsel, case submitted without argument to jury. Same day, the jury, on their oaths aforesaid, respectively do say that they do find the defendant Guilty and so they all say. Same day, motion of John W. Dunkle, U. S. Attorney, for judgment herein filed. Same day, Government's points and points for defendant filed. January 15, 1906, motion in arrest of judgment filed. February 9, 1906, opinion of Court handed down dismissing motion in arrest of judgment and granting motion of the Government to impose sentence. January 11, 1906, copy of testimony taken before jury and charge of the Court to jury and copy of Act of Legislature of New York declaring certain waters in Counties of Genesee and Allegheny to be public highways &c. filed. February 20, 1906, exceptions to said charge presented and order made that same be filed *nunc pro tunc* as of date of said charge to jury. February 20, 1906, "the sentence of the Court is, that you, the Union Bridge Company, pay a fine to the United States of Five Thousand Dollars; that you pay the costs of this prosecution, and stand committed until this sentence be complied with." April 12, 1906, petition of the Union Bridge Company for review of said judgment by the Supreme Court of the United States and for leave to have issued in said cause

a writ of error removing the record herein to the Supreme Court of the United States filed and order made allowing writ of error and directing defendant to give bail during the pendency of the cause in the sum of five thousand dollars and directing that said writ be a supersedeas of any execution upon the judgment herein, pending these proceedings. Same day, assignments of error filed. Same day, writ of error issued: returnable at Washington on the 2nd Monday of October next. Same day, citation issued: returnable at Washington on the second Monday of October next. April 21, 1906, bond of said defendant for appearance when required, acknowledged and filed, and order made approving same. May 12, 1906, on motion of W. B. Rodgers and Johns McCleave, counsel for defendant, order made extending for sixty days, the time for filing transcript of the record *sur* appeal in said case in the Supreme Court of the United States. July 7, 1906 on motion of Johns McCleave, counsel for defendant, order made extending time for filing record *sur* appeal in the United States Supreme Court for ten days from this date. July 23, 1906, on motion of W. B. Rodgers and Johns McCleave, attorneys for defendant, order made that the time for filing the record in said case in the Supreme Court be extended for the period of ten days from this date. September 27, 1906, defendant's bill of exceptions filed. Same day, on motion of Johns McCleave, counsel for defendant, order made extending time for filing record herein in the Supreme Court of the United States to the first day of October 1906.

Appearances: John W. Dunkle for the United States; W. B. Rodgers and Johns McCleave for defendant.

Witnesses: Maj. W. L. Sibert, Emil Swensson, Sarsfield A. McCarthy, J. W. Arras (for U. S.); Henry M. Long, Henry Schultz, (for Defendant).

230 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
vs.
THE UNION BRIDGE COMPANY.

Defendant's Bill of Exceptions.

Filed Sept. 27, 1906.

WM. T. LINDSEY, *Clerk.*

231 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

THE UNITED STATES OF AMERICA
vs.
THE UNION BRIDGE COMPANY.

Defendant's Bill of Exceptions.

Be it remembered that on the trial of this cause the Government, to maintain the issues on its part, introduced by Major W. L. Sibert evidence tending to show that he was an officer in the corp of engineers in the United States army and charged with the work of improvement of the Allegheny and Monongahela Rivers, and that part of the Ohio lying within the State of Pennsylvania; that he knew where the Union Bridge (the bridge of the defendant) was located, and that it is located now in the Allegheny River near its mouth and that the owner of the bridge was the Union Bridge Company, the defendant. Upon cross examination the said witness testified that the Union Bridge was located across the Allegheny River in its present place at the time he took charge of the Pittsburg district in December, 1901; that he knew when the said bridge was built only by the records of his office, and that by these records the bridge had been so located and constructed in its present place since 1874.

232 The Government then, to sustain the issues upon its part, offered in evidence the charter or letters patent of the Union Bridge Company dated August 17th, 1873, which charter is in words and figures as follows, to wit:

"An Act to incorporate the Union Bridge Company.

"SECTION 1. Be it enacted, etc., That George B. Hill, J. B. Smith, C. Howard, R. W. M'Connell, C. Hanson Love, W. H. Hagan, Wm. Coates, Adam Weaver, Wm. Sample, Jr., Charles Jeremy, J. B. Ramsey, Wm. H. Wilson, R. S. Hemiup, H. W. Oliver, Jr., John F. Jennings, Hugh M'Neil, Henry Warner, Geo. Reites, Alexander Patterson, Henry M. Long, and their associates, successors and assigns, be and they are hereby sealed and declared a body politic and corporate, by the name, style and title of the Union Bridge Company, and by that name and title shall have perpetual succession, and sue and be sued, plead and be impleaded in any court whatever, and contract and be contracted with, may have and use a common seal and alter the same at pleasure, and have and use and exercise all the rights and privileges and franchises that are or may be necessary, or that are hereby given or intended to be given.

"SECTION 2. That the said Union Bridge Company are hereby authorized to build, erect and construct a bridge over the Alle-

gheny River, at any practicable point on Duquesne Way, between Second Street and the Monongahela River and Allegheny
233 Avenue, or any other practical point in the City of Allegheny: Provided, That the erection of said bridge shall not obstruct the navigation of said river, so as to endanger the passage of rafts, steamboats, or other water crafts; and the piers shall not be so placed as to interfere with tow-boats proceeding out with their tows made up, and shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation.

"SECTION 3. The said company are hereby authorized to hold, use and own by purchase or otherwise, and to sell, lease, let, mortgage, transfer or convey all property, real, personal or mixed, necessary to their work and business, and that may from time to time be deemed proper.

"SECTION 4. That the capital stock of the said company shall be three hundred and fifty thousand dollars, with the privilege of increasing the same from time to time, as they may think proper and necessary to carry out this act, which stock shall be divided into shares of such amount as the board of directors may determine, and may be sold at the fixed par value, or at such price as may be deemed best, and be declared fully paid and not subject to further calls; and the said stock may be appropriated to the payment of materials furnished, labor performed or to be performed, expenses incurred, and in payment of ground, buildings, boats pur-
234 chased, leased or constructed, and for everything generally needed in carrying out the purposes of this act, and may also dispose of and use the said stock in the negotiations and sale of any securities authorized to be created by this act, either by absolute transfer for such consideration as may be deemed expedient or collateral security.

"SECTION 5. That any five of the persons in this act, or such persons as may hold a majority of the stock required to be subscribed for before commencing the building of the bridge, are hereby authorized to organize the corporation, and shall choose a majority of the stock subscribed and paid for as provided, a board of directors, consisting of not less than five persons, who shall choose or elect a president, a secretary and a treasurer, and such other officers as they may think necessary to conduct the business of the company; the directors and officers to hold their places for such time as may be fixed by the by-laws, and until other officers are chosen; and the said company shall have power to make such by-laws, rules and regulations not inconsistent with the constitution and laws of this state and of the United States, as may be necessary; the existence of said corporation to be in no wise affected by reason of failure to elect officers at the time fixed by the by-laws.

235 "Section 6. That the corporation, or a majority of them herein names, are hereby authorized and directed to open a book or books of subscription to the capital stock, of which notice shall be given in at least three newspapers published in the City of

Pittsburg, at such times and places as to them may be deemed most advisable; and as soon as fifty thousand dollars of the stock has been subscribed for, and ten per centum actually paid, in accordance with the provisions of this act, the said company may commence the business herein authorized.

"SECTION 7. The said company is hereby authorized to create a mortgage or mortgages on any part or the whole of their property, including the franchises hereby granted, and execute and deliver coupon bonds thereon, bearing interest at the rate of seven and three-tenth- per centum per annum, which bonds shall be convertible any time before maturity, at the option of the holder, into the stock of the said company; and the said company may dispose of the aforesaid securities at such rates as may be deemed proper, and also have the power of hypothecating them as security for the payment of the money loaned the said company.

"SECTION 8. That the president and managers of the company may contract with the owners of any land for the purchase of so much as shall be necessary for completing said bridge, and
236 making all necessary works and causeways to and from the same; but in case they cannot agree, then it shall and may be lawful for the said president and managers to apply to the court of common pleas of the proper county, who are hereby authorized and required to appoint three disinterested persons of such county, who after being duly sworn or affirmed faithfully to perform the duties enjoined, shall proceed to view the said lands necessary for completing the said bridge, and making the necessary works and causeways to and from the same, and shall estimate the value of the said lands to be taken, and the advantages as well as disadvantages which may be sustained by the owners of such lands, shall make an appraisement thereof, and return the same with the map of such lands to the said court of common pleas; and the said appraisement, having been approved by the court, shall be filed together with the said map; and the said company having paid to the owners respectively the several sums awarded to them with the costs, after the same shall have been confirmed by the court, shall be entitled to have and to hold them, their successors and assigns, the said land as fully as if conveyed by their owners: Provided, That said appraisement shall be held to be confirmed by the court of common pleas, unless exceptions be filed by either party within ten days, after the said shall have been approved.

237 "SECTION 9. That if any person or persons shall wilfully pull down, break or destroy any part of said bridge, or any toll house, gate or other property of the said corporation, erected for the use of said bridge, or shall wilfully or maliciously obstruct the passage over the said bridge, each of them shall forfeit and pay for each and every offense, to the said company, the sum of twenty dollars, to be recovered as other debts of like amount are recoverable, and be imprisoned in the jail of the proper county for a period of not less than ten or more than thirty days, at the discretion of the court; and if any person shall be guilty of carrying a lighted cigar

or pipe, or of carrying fire in manner whatsoever on said bridge, except in a lantern or in some vessel secured, so that the probability of setting fire to said bridge shall be fully prevented, or shall discharge any pistol, or gun, or any fire arms on or near the bridge, he, she or they so offending shall forfeit and pay to the said company the sum of twenty dollars, and suffer imprisonment as aforesaid; or if any person or persons shall ride or drive on or over said bridge in a faster gait that a walk, he, she or they so offending shall forfeit and pay to the said company the sum of ten dollars for every such offense, to be recovered in like manner as aforesaid; but no suit shall be brought for any of the aforesaid offenses, unless commenced within thirty days after it shall be known who committed said offenses, and he, she or they so offending shall remain liable
238 to the actions at the suit of said company, if the sums herein mentioned be not sufficient to repair and satisfy said damage.

"SECTION 10. The said company is hereby authorized to hold, use and own by purchase or otherwise, sell, lease, let, mortgage, transfer or convey all property, real, personal or mixed, necessary to their work and business, and that may from time to time be deemed proper.

"SECTION 11. That it shall be lawful for the president and managers, their superintendents, engineers and workmen, to enter on lands near the place where the bridge is to be built, for the location of the same, and to cut and carry away timber, dig gravel, quarry stone, or gather sand necessary for building; also to enter thereon with wagons and carts, to take and carry off any material necessary, doing as little damage as possible, and making amends for damages, or giving security for the same; and if the parties cannot agree upon the amount, said damages shall be assessed as road damages are by law assessed; the president and managers shall pay such damages with costs, and in case of refusal, the court shall enforce payment by execution.

"SECTION 12. The stockholders shall be personally liable for materials furnished, and labor performed, to the amount only remaining unpaid on the stock held by them respectively.

239 "SECTION 13. That the said company are empowered to erect gates, and to demand and receive the same tolls for crossing said bridge as are now by law authorized and collected for crossing over the wire suspension bridge at Sixth Street, (late St. Clair Street), in said city.

"SECTION 14. The governor is hereby authorized and directed to grant and issue letters patent to the corporation or a majority thereof named in this act, or their assigns, whenever fifty thousand dollars of the stock shall have been subscribed, and five per cent. thereon paid in, as provided for in this act, satisfactory certificate of this fact having first been made to the governor.

Approved The 13th day of March, A. D. 1873.

J. F. HARTRANFT.

240 The Government, then, to maintain the issues upon its part joined, offered in evidence a certified copy of the notice of the

Secretary of War to the Union Bridge Company, dated January 20th, 1903, which said notice is in language and figures as follows:

241 Ex. 3. 1/10/06. L. D. 1.

WAR DEPARTMENT,
WASHINGTON CITY, *January* 20, 1903.

To The Union Bridge Company, Pittsburg, Pennsylvania.

Take notice that—

Whereas, The Secretary of War has good reason to believe that the bridge of the Union Bridge Company, a corporation existing under the laws of the State of Pennsylvania, across the Allegheny River, and connecting the cities of Pittsburg and Allegheny, Pennsylvania (said bridge being known as the Union Bridge), is an unreasonable obstruction to the free navigation of the said Allegheny River (which is one of the navigable waterways of the United States) on account of insufficient height and width of span, and of wide and high riprapping at the piers;

And whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation under it reasonably free, easy, and unobstructed, to-wit:

Alter said bridge so as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second span from the Pittsburg shore to give a clear headroom over the Davis Island Pool of not less than 70 feet; and the first span from the same shore to give a clear headroom of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and that all parts of the old structure not
242 comprised in the new construction and in conformity with the above requirements shall be wholly removed.

And whereas, Eighteen (18) months from the date of service of this notice is a reasonable time in which to alter the said bridge as described above;

Now, therefore, In obedience to, and by virtue of, section eighteen of an Act of the Congress of the United States entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, I Elihu Root, Secretary of War, do hereby notify the said Union Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before the expiration of eighteen months from the date of service hereof.

ELIHU ROOT,
Secretary of War.

243 This to be followed by evidence showing the compliance by the Secretary of War with the 18th Section of the River and Harbor Act of March 3rd, 1899.

To which offer counsel for the defendant objected as incompetent and irrelevant, and, further, under the 18th Section of the Act of March 3rd, 1899, referred to in the paper offered, the Secretary of War had no lawful authority to make or issue said order; which objection was overruled by the court and exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

The Government then, to maintain the issues upon its part, offered in evidence a certified copy of the letter of the chief of engineers of the United States Army by A. Mackenzie, colonel of the corps of engineers, dated October 23rd, 1903, directing Capt. W. L. Sibert to issue the foregoing notice on the Union Bridge Company, which letter is in words and figures as follows:

244 Ex. 4. 1/10/06. L. D. 1.

OFFICE OF THE CHIEF OF ENGINEERS,

UNITED STATES ARMY.

WASHINGTON, *January* 23, 1903.

Capt. W. L. Sibert, Corps of Engineers, Pittsburg, Pa.

CAPTAIN: Referring to previous correspondence on the subject, there is enclosed herewith a notice, in duplicate, addressed to the Union Bridge Company, requiring the alteration of the bridge owned and controlled by that company across the Allegheny River, connecting the cities of Pittsburg and Allegheny.

You will please make service of this notice, by causing one copy to be personally delivered to the president or other proper official of the company. The duplicate, with form of affidavit properly executed, will be returned to this office with letter reporting action taken under these instructions.

By command of Brig. Gen. Gillespie.

Very respectfully, your obedient servant,

A. MACKENZIE,
Colonel, Corps of Engineers.

245 Which offer was objected to by counsel for defendant as irrelevant and incompetent. Objection overruled and exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Counsel for the Government also offered certified copy of the petition of the Union Bridge Company by O. D. Thompson, attorney, dated July 23rd, 1904, requesting that the order of the Secretary of War directing the Union Bridge Company to alter the Union Bridge on or before July 26th, 1904, be extended and a time fixed

to present reasons for re-hearing, which letter was in words and figures as follows:

246 Ex. 5. 1/10/06. L. D. I.

To the Honorable Wm. H. Taft, Secretary of War of the United States of America:

Whereas: The Union Bridge Company of Pittsburgh, Pennsylvania, a duly authorized corporation of the State of Pennsylvania owning and operating the Union Bridge, over the Allegheny River at Pittsburgh, Pennsylvania, under and by virtue of the authority of the United States Government, and whereas: The former Secretary of War ordered and directed The Union Bridge Company to alter, change and elevate the Union Bridge on or before the Twenty Sixth day of July A. D. 1904.

Now July Twenty Third A. D. 1904 comes The Union Bridge Company by O. D. Thompson, its attorney, and requests that the time July 26th, 1904 may be extended and a day fixed when The Union Bridge Company may present reasons for a rehearing in the matter of the change, alteration and elevation of the Union Bridge.

THE UNION BRIDGE COMPANY,
By O. D. THOMPSON, *Attorney.*

247 Which offer was objected to by counsel for defense as incompetent and irrelevant, which objection was overruled, exception noted and bill sealed for the defendant.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

The Government also offered in evidence a certified copy of order or letter of the Secretary of War to Gen. Mackenzie, Chief of Engineers, dated July 24th, 1904, directing him to notify the Union Bridge Company that the order requiring the change of the bridge would be extended from July 26th, 1904, to August 10th, 1904, which letter is in words and figures as follows, to wit:

248 Ex. 7. 1/10/06. L. D. I

WAR DEPARTMENT,
WASHINGTON, *September* 28, 1904.

Memorandum.

The time fixed in War Department notice of January 20, 1903, for completing the alteration of the bridge, known as the "Union Bridge," across the Allegheny River at Pittsburg, Pennsylvania, having been heretofore extended to October 1, 1904, is hereby further extended to December 1, 1904.

WM. H. TAFT,
Secretary of War.

249 The Government also offered in evidence a certified copy of the memorandum of order of the Secretary of War dated November 10th, 1904, which order is in words and figures as follows, to wit:

250 WAR DEPARTMENT,
WASHINGTON, *November* 10, 1904.

Memorandum.

The time fixed in the War Department notice of January 20, 1903, for completing the alteration of the bridge, known as the "Union Bridge" across the Allegheny River at Pittsburg, Pennsylvania, having been heretofore extended to October 1, 1904, and later to December 1, 1904, is hereby further extended to January 1, 1905.

WM. H. TAFT,
Secretary of War.

Ex 8, 1/10/06, L. D. I.

251 The Government also offered in evidence certified copy of the order of Secretary of War Taft, dated June 21, 1905, refusing the petition of the Union Bridge Company for re-hearing, which order is in words and figures as follows, to wit:

252 Ex. 9. 1/10/06. L. D. I.

WAR DEPARTMENT, WASHINGTON.

In the Matter of THE UNION BRIDGE.

The Union Bridge is an unreasonable obstruction to commerce of the Allegheny River. If the bridge were not there, the winter refuge which the stretch of the Allegheny River up to the next bridge would offer for the fleet of boats, which usually are moored in the Monongahela, would be a very great advantage for navigation and commerce on the Ohio River and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in different sections of the country, have their ice breaks at different times in the early spring. The mouth of the one offers very desirable refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The Union Bridge at the mouth of the Allegheny was erected at a time when the Secretary of War was not given specific control over navigable streams, and was not authorized to inhibit the construction of bridges which were likely to obstruct navigation, but it appears that an army engineer, Colonel Merrill, in charge of the District, publicly announced that this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the Government. These are the facts that I find independently of any previous adjudication; but added to this, is the finding of my predecessor, Mr. Root, to exactly

the same effect, upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before me on a petition for rehearing of Mr. Root's order. As an original question I should have ruled as Mr. Root ruled, and *a fortiori*, because the orders of this Department are not to be lightly set aside, and are to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake. The petition
253 for rehearing is denied, and the order suspending the operation of Mr. Root's order is now revoked. The order will be put in full force and executed by the proper officers and the Union Bridge will be notified accordingly.

WM. H. TAFT,
Secretary of War.

June 21, 1905.

Which offer was objected to by the defendant as irrelevant and incompetent, which objection was overruled by the court, exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

254 The Government also offered a certified copy of petition of certain persons, corporations and companies in and about Pittsburg to the Secretary of War, dated August, 1902, which petition is in words and figures as follows, to wit:

255 Ex. 10. 1/10/06. L. D. I.

PITTSBURG, PA., *August*, 1902.

To the Honorable Elihu Root, Secretary of War, Washington, D. C.

We the undersigned, citizens of the City of Pittsburg, interested in its harbor facilities and its commerce upon its adjacent rivers, beg respectfully to call your official attention to the bridge commonly called the Union Bridge, crossing from the City of Pittsburg to the City of Allegheny, at or near the mouth of the Allegheny River.

There can be no doubt whatever that this bridge is an unreasonable obstruction to the free navigation of the Ohio, Monongahela and Allegheny Rivers on account of insufficient height and the filling in of the river or rivers over which it passes in order to provide approaches for it.

We respectfully request that you will investigate this matter, having full confidence that after making such investigation you will find it to be your duty to take action against its owners, the Union Bridge Company, under the provisions of Section 18, of the River and Harbor Act, approved March 3, A. D. 1899.

This Bridge was built under the provisions of an Act of General Assembly of the Commonwealth of Pennsylvania, approved March 13, A. D. 1873. Section 2nd of the Act of Incorporation provided: "That the Union Bridge Company are hereby authorized to build, erect and construct a bridge over the Allegheny River at any practicable point in Duquesne Way, between Second Street and the Monongahela River and Allegheny Avenue, or any other practicable point in the City of Allegheny; Provided that the erection of said Bridge shall not obstruct the navigation of said river so as to endanger the passage of rafts, steamboats or other water
256 craft, and the piers shall not be so placed as to interfere with tow-boats proceeding out with their tows made up, and shall be constructed in such manner as to meet the requisitions of the law in regard to the obstruction of navigation."

We believe that we can establish to your full satisfaction by the testimony of many reputable witnesses that this bridge was built entirely below the confluence of the Monongahela and Allegheny Rivers and that fills were made in the Ohio River between high and low water lines in order to make the approaches to the Bridge. We believe we can show that the Bridge as built crosses entirely over the Ohio River, over which river the United States had assumed jurisdiction prior to the building of this bridge, by Act of Congress of December 17th, A. D. 1872.

The Bridge as constructed in no way complied with this Act of Congress.

It was built of such a low height above the water as to cause the almost complete obstruction of all the packet and tow boat trade passing from the Allegheny River into the Ohio and Monongahela Rivers, and from these Rivers into the Allegheny.

In building it the width of the river was very materially narrowed as already stated by the fills made for the approaches.

The River Commerce of Pittsburg, as you are aware, is of very great magnitude and importance and is rapidly increasing in volume. For the last Calendar Year it amounted to 10916489 tons, being about equal to that of the harbor of New York. The extension of the Manufacturing Industries of Pittsburg up the Allegheny River is making i of much greater importance than heretofore that the navigation to and from that river should not be obstructed.

257 The present time is peculiarly appropriate for action by you. The Union Bridge is an old wooden structure and will soon need, in fact it already needs extensive repairs to make it safe for Public use.

Therefore, as the Bridge in question deprives the community of a reasonable use of the Allegheny River in connection with the river business of this great harbor, we appeal to you to exercise the powers committed to you to abate or to at least mitigate this great public nui-

sance as you shall find yourself justified by the law and the facts of the case.

Very respectfully yours,

JAS. REES & SONS CO.,
THOMAS REES, *Vice Pres't.*
RODGERS SAND CO.,
WM. B. RODGERS, *Pres't.*
MONONGAHELA IRON & STEEL CO.,
R. A. CARTER, *Pres't.*
THE MONONGAHELA RIVER CONSOLIDATED COAL & COKE CO.,
HUGH MOREN, *Transp'n Dep't.*
THE PITTSBURG COAL EXCHANGE,
JOHN F. DRAVO, *Sec.*
THE PEOPLES COAL COMPANY,
J. M. BUCHANAN, *Pres't.*
IRON CITY SAND CO.,
P. M. PFEIL, *Pres't.*
CLYDE COAL CO.,
J. H. SANFODS, *Gen. Manager.*
FLINT & CO.
DILWORTH COAL CO.,
H. R. DILWORTH, *Pres.*
ALVIN SAND CO.,
F. E. GARLICK, *Treas.*
J. K. DAVIDSON & BRO., *Sand Dealers.*

258 Which offer was for the purpose of showing a compliance by the Secretary of War with Section 18 of the River and Harbor Act of March 3rd, 1899, before making the final order requiring the Union Bridge Company to alter said bridge which offer was objected to by counsel for defense as incompetent and irrelevant and not tending to support the offer, which objection was overruled, exception noted and bill sealed for defendant.

JOS. BUFFINGTON,
Trial Judge.

The Government then offered a certified copy of the second endorsement of the chief of engineers United States Army by H. D. Hodges of the corps of engineers, dated September 23rd, 1902, referring said petition to Capt. W. E. Sibert for report, which endorsement is in words and figures as follows:

Ex. No. 11. 1/10/06. L. D. I.

2nd Indorsement.

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *September* 23, 1902.

Respectfully referred to Capt. W. L. Sibert, corps of Engineers, for report.

To be returned.

By command of Brig. Gen. Gillespie:

H. F. HODGES,
Major Corps of Engineers.

259 Which offer was objected to by counsel for defense as incompetent and irrelevant, there being no power given under the Act to the Secretary of War to refer or to subdelega- his power to any officer under him; and for the further reason that this is the delegation of power by a subaltern in the War Department at Washington undertaking to delegate powers under the Act of March 3rd, 1899, to Capt. W. L. Sibert without any authority thereto contained in the act, Which objection was overruled by the court and exception noted and bill sealed for the defendant.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

The Government then offered certified copy of the third endorsement or preliminary report of Capt. W. L. Sibert, dated October 13th, 1902, together with sheets 1, 2 and 3 accompanying and being part of said report; also, certified copy of the fourth endorsement or report of G. L. Gillespie, Chief of Engineers United States Army to the Secretary of War, dated October 16th, 1902; also certified copy of the fifth endorsement or approval of the Secretary of War, dated October 16, 1902; and also certified copy of the sixth endorsement of the Chief of Engineers United States Army, by A. Mackenzie, colonel of the corps of engineers, dated October 23, 1902, referring same to Capt. Sibert for further report; also certified copy of the seventh endorsement of W. L. Sibert, Captain of corps of engineers, to the chief engineers of the United States Army without date; also certified copy of the eighth endorsement, report of the chief
260 of engineers United States Army by G. L. Gillespie, Brigadier General Chief of Engineers, to Secretary of War, dated December 16th, 1902.

Which said report, with all the above named indorsements are in words and figures as follows:

261 Ex. No. 12. 1/10/06. L. D. I.

3rd Indorsement.

U. S. ENGINEER OFFICE.
PITTSBURG, PA., *Oct.* 13, 1902.

Respectfully returned to the Chief of Engineers, U. S. Army.

1. I have made a careful investigation as to whether the Union Bridge when built crossed the Allegheny River or a portion of the Ohio River, and I am of the opinion that the entire bridge was built over the navigable waters of the Ohio River, while the charter under which it was built authorized a bridge across the Allegheny River.

2. There is enclosed herewith, Sheet I, a blueprint of a certified copy of the upper and lower wharf lines at the point between the two streams forming the Ohio River. This print also shows the location of the bridge in question. While it is true that the public right had been gradually stolen upon by unauthorized filling beyond these lines, such filling had not reached the location of the Pittsburg abutment of the bridge in question prior to the building of the bridge. From competent witnesses I have platted on Sheet I the probable location of the low water line, the 8-ft. line and the "top of bank" line, around the point between the Allegheny and Monongahela rivers at the time of the building of the bridge. These lines are distinctly marked on map. From which it is seen that the Pittsburg abutment of the bridge was built below the low water confluence of the Allegheny and Monongahela rivers. The bed of the Ohio, according to the decisions of the courts of the State of Pennsylvania, would be the bed of that river below the confluence of the two streams forming it at ordinary high water. If the water lines as shown on sheet I be approximately correct, an examination of that Sheet will show that the entire bridge was built across the waters of the Ohio River. One witness, who was making daily trips around the point, states that the best low water channel was between the Pittsburg shore and the abutment in question, and that boats continually used that channel until prevented from such use by the guy lines of the derricks used in building the abutment in question, and that the bridge company built a trestle bridge from the abutment to the Pittsburg shore, which was afterwards converted into a fill.

3. While the bridge in question did not cross all of the Ohio River when built, it crossed a portion of it and did not comply with the act of Congress of Dec. 17, 1872, as to clear height or width of span, and was not authorized by a special act of Congress. The State authority under which the bridge was built authorized a bridge across the Allegheny River and not across any of the navigable waters of the Ohio.

4. Had the bridge as built been built across the Allegheny River, its clear height above low water and its width of spans were such as to be in violation of the law that gave corporate existence to the company that built it. To prove that it is an unreasonable obstruction to navigation, it is only necessary to compare its clear height above the pool made by Davis Island Dam with the height of such boats

as would navigate this portion of the Harbor of Pittsburg were they not prevented by the bridge from so doing. The clear height of the bridge in question above Davis Island Pool is about 36 feet. The following is the height of each and every packet, with chimneys down, that runs south from Pittsburg:

262

Kanawha,	47 ft.	
Greenwood,	46 "	
Lorena,	47 "	
Ben Hur,	46 "	
Avalon,	42 "	46′ 2″ to top of whistle.
Virginia,	50 "	56 ft. to top of ornaments.
Queen City,	50 "	3 in., 56 ft. to top of ornaments.
Keystone State,	45 ft.,	47′ 6″ to top of ornaments.

The height of the average towboat, engaged in transporting the products of this district south is about 45 ft., with chimneys down. This bridge stands, therefore, as a permanent bar to a reasonable inter-state commerce by water transportation between the valleys of the Allegheny, Monongahela and Ohio rivers. In the opinion of this office, the rights of the people to the free use of the navigable waterways of this country demand removal.

5. The Union Bridge destroys an essential element of the Harbor at Pittsburg. It prevents shipping in the Monongahela or Ohio river in stress of floods or floating ice from seeking protection in the Allegheny River, the floods and ice-runs out of the latter river being seldom coincident with those out of the Monongahela.

6. In addition to the unreasonable obstruction to navigation made by this bridge on account of its clear height and widths of spans, the cheap method followed in its pier construction forced upon the company the necessity of occupying by the riprap protection of the piers 247 feet of the waterway of the river over and above that necessary for piers properly built. Sheet No. II herewith shows this condition. The right to maintain a bridge should not carry with it the right to occupy more of the channel than that necessary in building a bridge in accordance with the best engineering practice. Exhibit A shows some correspondence between this office and the bridge company on this point.

7. It being the opinion of this office that the Union Bridge has no legal existence and that it is an unreasonable obstruction to navigation, it is therefore recommended that the bridge company owning the bridge connecting the cities of Pittsburg and Allegheny at or near the mouth of the Allegheny River and known as the Union Bridge, be required under Sec. 18, River and Harbor Act of March 3, 1899, to so modify their bridge as to remove all unreasonable obstruction to navigation.

8. The interests of navigation demand that this bridge shall have a channel span giving a clear height of 70 ft. above the pool made by Davis Island Dam and a clear width of 394 ft., and that its other spans shall be as shown on Sheet III.

9. The bridge crossing the Monongahela River at or near its mouth and the bridge now being built by the Wabash R. R. a short

distance above it, each have a clear height of 70 ft. above the pool made by the Davis Island Dam. This height is necessary at the Union Bridge in order to make a harbor at Pittsburg for its immense shipping.

10. There is enclosed herewith a plan for accomplishing the necessary changes, Sheet III. The present bridge is a timber bridge, old and rotten and unsafe for heavy traffic and a new bridge is necessary. Since it is necessary for this bridge to have the same height as the Point Bridge over the Monongahela River, the existing approach to the Point Bridge forms an approach to the raised Union Bridge on the Pittsburg side. The bridge is a highway bridge, and
263 an approach from Duquesne Way is also shown. On the Allegheny City side a graded approach will be necessary, as shown on Sheet III. This portion of Allegheny City is submerged at floods and should be raised.

11. Name of company; Union Bridge Co. Name of President; James M. Bailey, c/o Phillips, Nimick & Co., Pittsburg, Pa.

WM. L. SIBERT,
Captain, Corps of Engineers.

4th Indorsement.

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *October* 16, 1902.

Respectfully returned to the Secretary of War.

This is a complaint that the bridge commonly called the "Union Bridge" crossing from the city of Pittsburg to the City of Allegheny at or near the mouth of the Allegheny River, Pa., is an unreasonable obstruction to navigation.

Full report on the subject is made in 3d indorsement hereon by Captain Sibert, in whose opinion the bridge is an unreasonable obstruction to navigation, and he recommends that its alteration be required so that it shall have a channel span giving a clear height of 70 feet above the pool made by Davis Island Dam with a clear width of 394 feet, and that its other spans shall be as shown on the map (sheet No. 3) herewith.

I recommend that the papers be returned to Captain Sibert with instructions to hold a public hearing, after due notice to all interested parties, as required by the law and the orders of the War Department of September 16, 1891.

G. L. GILLESPIE,
Brig. Gen., Chief of Engineers, U. S. Army.

5th Indorsement.

WAR DEPARTMENT, *October* 18, 1902.

Approved as recommended by the Chief of Engineers.

E. ROOT,
Secretary of War.

6th Indorsement.

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *October* 23, 1902.

Respectfully returned to Captain Sibert, attention being invited to 4th and 5th indorsements hereon.

It is desired that Captain Sibert's further report shall show that the law and the orders of the War Department have been complied with.

264 The notice of hearing should specify the time in which specified alterations should be made.

To be returned.

By command of Brig. Gen. Gillespie:

A. MACKENZIE,
Colonel, Corps of Engineers.

7th Indorsement.

U. S. ENGINEER OFFICE, PITTSBURG, PA.

Respectfully returned to the Chief of Engineers, U. S. A.

A separate report is forwarded herewith.

WM. L. SIBERT,
Captain, Corps of Engineers.

8th Indorsement.

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *December* 16, 1902.

Respectfully returned to the Secretary of War.

Previous action in this case will be seen by reference to 3d and subsequent indorsements hereon.

As required by the law and the instructions of the War Department, a public hearing has been held, after due advertisement, and all interested parties have been afforded an opportunity to present their views. Attention is respectfully invited to the accompanying report on the subject, dated the 8th instant, by Captain Sibert, and to its accompanying papers.

In this report Captain Sibert fully discusses all phases of the question and shows that, without reference to the use of the Allegheny River for through navigation, the bridge in question is an unreasonable obstruction, and practically a bar, to the use of that portion of Pittsburg Harbor situated on the river. He states that none of the boats engaged in interstate commerce from Pittsburg, south and west, can reach, at low water, a single manufacturing plant or wharf in the cities of Pittsburg and Allegheny on the Allegheny River. He submits a photograph to show that the portion of Pittsburg Harbor in the Monongahela River is crowded with shipping while that portion in the Allegheny has none, all due to the existence of the Union Bridge. It is also shown by the evidence that the lower

portion of the Allegheny River would be of great importance as a harbor of refuge when ice is running out of the Monongahela River, if it were not obstructed by the Union Bridge. He reaches the conclusion, based on the facts developed at the hearing, that in order to give the shipping at Pittsburg increased harbor room and to enable it to connect with wharves and manufacturing plants in that part of the harbor located on the Allegheny River, the Union Bridge should be so raised as to provide a channel-span with a clear height of 70 feet, the same as exists under the bridge known as the "Point Bridge" on the Monongahela River, and the same that will exist under the Wabash Railroad bridge just being built imme-
265 diately above the Point Bridge.

It appears that this bridge was built in 1873-4 by the Union Bridge Company, incorporated under authority of an act of the Pennsylvania legislature of March 13, 1873, and that it has been the subject of complaint on the part of navigation interests practically ever since its completion. Numerous investigations have been made by different engineer officers, who have held public hearings on the subject, and who have concurred in expressing the opinion that the bridge was an unreasonable obstruction to navigation, and that it should be raised so as to give a headroom equal at least to that of the aforesaid Point Bridge at the mouth of the Monongahela River.

The Union Bridge is situated at the mouth of the Allegheny River, and there seems to be no room for doubt that the alteration of the bridge is essential to the reasonable use for navigation and commercial purposes of that portion of the river forming a part of Pittsburg Harbor.

Captain Sibert recommends that the bridge in question be so altered as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second span from the Pittsburg shore to give a clear headroom over the Davis Island pool of not less than 70 feet; and the first span from the same shore to give a clear headroom of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed. The period of 18 months is considered by him ample time within which to make these alterations.

I concur in his views and recommend that notice be served on the bridge company, requiring the alterations to be made and completed as specified by him.

G. L. GILLESPIE,
Brig. Gen., Chief of Engineers, U. S. Army.

266 To which offers the counsel for defendant objected as incompetent and irrelevant, and that none of the proceedings set forth in the endorsements were had with notice to or with the knowledge of the Union Bridge Company.

Whereupon the court required of counsel for the Government to state the time when the Union Bridge Company received notice of the proceedings offered, to which counsel for the Government replied on November the 4th, 1902. Thereupon the court overruled the objections upon the part of defendant admitted the evidence, noted exception and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

267 Ex 13. 1/10/06. L. D. I.

ENGINEER OFFICE, U. S. ARMY,
PITTSBURG, PA., *Dec.* 8, 1902.

P. O. Box 1240.

Brig. Gen. G. L. Gillespie, Chief of Engineers, U. S. Army, Washington, D. C.

GENERAL: 1. I have the honor to forward herewith the records of the hearings held in the case of the Union Bridge, as authorized in the 5th Indorsement on E. D. file 34349/39, and to submit the following report thereon:

2. Exhibit A is the typewritten reproductions of the stenographic records of the oral part of the hearings.

3. Exhibit B comprises a brief submitted by an attorney for the petitioners and statements and papers filed in the case by persons and corporations who wish the bridge in question raised. The following is a list of the persons and corporations writing such communications:

Jones & Laughlin Steel Co., B. F. Jones, Jr., Prest.	Pittsburg, Pa.
Reuben Miller, Prest. Crucible Steel Co. of America	do.
J. H. Price, Manager, American Steel & Wire Co.	do.
Armstrong Cork Co.	do.
Pennock Hart, of Mackintosh, Hemphill & Co.	do.
Wm. McConway, of McConway-Torley Co.	do.
Ward-Mackey Co.	do.
Jas. H. Baker Mfg. Co.	do.
H. J. Heinz Co.	do.
Bessemer Coke Co.	do.
J. J. Saint, Land Agent, Bessemer & Lake Erie R. R.	do.
Wm. B. Rodgers, of the Rodgers Sand Co.	do.
James Rees & Sons Co., Thomas M. Rees, Gen'l Mgr.	do.
Pgh. & Cincinnati Packet Line, James A. Henderson, Prest.	do.
The Monongahela River Consolidated Coal & Coke Co.	do.
John A. Wood	do.
Allegheny Plate Glass Co.	do.

Verona Tool Works		do.
Pittsburg & Buffalo Co.		do.
Monongahela & Western Dredging Co.		do.
Pittsburg Coal Exchange, John F. Dravo, Sec'y.		do.
C. Jutte & Company		do.
The Peoples Coal Co.		do.
McKeesport Sawmill Co.		do.
Flint & Co.		do.
Clyde Coal Co.		do.
Pittsburg & Morgantown Packet Co., T. J. Wood, Prest.		do.
268	Dilworth Coal Co.	Pittsburg, Pa.
	Capt. H. P. Hudson, Stmr. Florence Belle.	do.
Pennsylvania Salt Manufacturing Company.		Philadelphia, Pa.
S. B. Cochrane, Prest. Allegheny River Impvt. Ass'n		Kittanning, Pa.
Preamble and Resolutions to the Hon. Elihu Root, Sec. of War, adopted at a meeting of 350 delegates representing the people of the Allegheny Valley, Crystal Mirror Works.		do.
Elk Brewing Co.		do.
John T. Simpson, Editor Kittanning Times.		do.
H. A. Colwell, Supt., Kittanning Iron & Steel Mfg. Co		do.
J. W. Ganoe, Diamond Mines & Melrose Coal Mining Co.		Phillipston, Pa.
Ford China Co.		Ford City, Pa.
Cowansville Coal Co., by John D. Murray.		Mosgrove, Pa.
Dewey Iron & Steel Co.		Brady's Bend, Pa.
Brady's Bend Portland Cement Co.		do.
Brady's Bend Coal & Coke Co.		do.
Edward Wilkins Dewey		do.
H. M. Brackenridge.		Natrona, Pa.
John Jackson.		

4. Exhibit C comprises the opening and closing statements of the Bridge Company as presented by its attorney, a protest submitted by an attorney for certain property holders on Grant Avenue, Allegheny, and letters protesting against the elevation of the bridge. The following is a list of the parties writing such letters:

Pittsburgh Stove & Range Co.	Pittsburg, Pa.
W. H. Speaker.	do.
W. W. Lawrence & Co.	do.
Thos. Fox Est.	do.
Michael McCall, by P. J. McCall.	do.
Rosedale Foundry Co.	Allegheny, Pa.
Clark Bros	do.
Gross & Hastings.	do.
Magnus Metal Co.	do.
Pennsylvania Casting & Machine Co.	do.

Fred. Gwinner	Allegheny, Pa.
J. R. Carlisle Transfer Co	do.
T. H. Nevin Co	Allegheny, Pa.
George F. Egan	do.
Knox, Strauss & Bragdon	do.
A. D. Miller's Sons Co	do.
Cream City Woven Wire Works	do.
National Casket Co	do.

5. Exhibit D comprises certain photographs, maps and sections of boats submitted in the case.

6. Exhibit E comprises list of parties to whom notices of hearings were sent by mail; copies of advertisements inserted for 6 days in the following newspapers: The Pittsburg Dispatch, The Pitts-
269 burg Gazette, The Pittsburg Leader and The Pittsburg Times; also notices of hearing served on the President of the Bridge Co. This notice specifies the character of the obstruction, the changes necessary to render navigation through and under the bridge reasonably free, easy and unobstructed, and what will be a reasonable time in which to make them, also when and where the hearing will be, and contains on the first fold an affidavit that J. W. Arras, Asst. Engineer, personally served the notice on the President of the Bridge Co. in question, James M. Bailey. This exhibit shows that the law and orders of the War Department were complied with in this case.

7. In the opening statement of the Bridge Co. in this case it seems to be assumed that the questions of possibly depriving a community of a bridge, and of imposing a possible loss on the stockholders of a bridge company, are potent reasons why a law enacted by the Congress of the United States should not be executed by those whose duty it is to execute such law.

8. It can always be safely assumed that if a community needs a bridge at a certain place, that a bridge will be built complying with the law and that any State or City legislation necessary will be forthcoming if the people need the bridge, and such questions are not pertinent to this case as I read the law. The construction of bridges giving a clear height of 90 ft. above low water across the Ohio River has always been found practicable because that height was prescribed by the Congress of the United States.

9. However, I will submit some remarks on the allegations made in the papers opening and closing the case for the Bridge Co. The Union Bridge is a wooden bridge built in 1874 & 5; it is, therefore, 27 to 28 years old. The Bridge Co. states that to rebuild the bridge in accordance with the requirements of the United States
270 would be an impossibility from a financial standpoint. Since the Secretary of War has the legal right to specify the height and length of spans of any bridge when rebuilt, it follows that should it be necessary to rebuild the bridge in the near future, and should the Secretary of War specify the same plans as proposed in this case, that the Company, from its own statement, would consider its charter worthless, hence its damages would be measured more by the earning

capacity of the old wooden bridge during the remainder of its efficient life than by the capital stock and bonds of the Company. Twenty-seven to twenty-eight years is a large portion of the life of a wooden structure, and the Company invested its money in a wooden structure.

10. In the closing argument of the Bridge Co., several statements are made that are not supported by any testimony presented at the hearing. These statements will be taken up seriatim.—

1st. In Exhibit D, photograph No. 68 shows the Union Bridge over the Allegheny River and a portion of the Point Bridge over the Monongahela River. The Point Bridge gives 70 fe. clearance over the Davis Island Pool, and the Union Bridge 35.5 ft. clearance over the same pool, both in the City of Pittsburg and within 200 feet of each other at the Pittsburg end. By locating the Pittsburg end of the Union Bridge as shown on enclosure 34349/43, it is seen that it will be an easy matter to make an approach to the Pittsburg side of this bridge. On the Allegheny side the low ground, subject to overflow, makes a long and raised approach necessary. This approach can be either on Grant Avenue or alongside of it to South Avenue, in case the City of Allegheny does not wish to raise the street grade above overflow. At South Avenue, where the approach terminates, the street is overflowed during floods to a depth of about 8.5
271 feet. This portion of Allegheny is in consequence not very valuable. The following is an estimate of the approximate cost of a new bridge and approaches made by Mr. Emil Swenson, an expert bridge engineer:

"Removal of old bridge, material going to contractor....	$12,000.
River spans, sub and super structure, complete.....	298,310
North approach, sub- and super-structure, complete....	38,085
South approach, embankments.....	40,450
Toll houses.....	2,500
Total	391,345.
Contingency, 10%.....	39,134
Grand total.....	430,479."

The question of damage to abutting property owners in the overflowed district in Allegheny not being considered. People who will not raise City property so that it will not be overflowed have little ground for complaint if approaches to bridges are raised for the accommodation of the general public in reaching a bridge of height sufficient to allow a reasonable use of the river crossed.

2nd. As to the allegation that the height and width of span of the Union Bridge when built were satisfactory to both State and local authorities and that no objection was made by the river interests nor by the United States Government, the facts do not support them. The State of Pennsylvania had no official, so far as can be ascertained, that passed upon the plans of bridges and the builder was the sole judge as to whether the bridge that he proposed would obstruct navigation, and the local authorities had no jurisdiction in the mat-

ter. Complaint was made to the Secretary of War by James Rees, of Pittsburg, Pa., submitted to the War Department June 23, 1874, and the following is an extract from the report of the Chief of Engineers, U. S. Army, to the Secretary of War.

* * * * * * *

"It seems that the bridge in question was authorized by act of the State of Pennsylvania, approved March 13, 1873, entitled "An act to incorporate the Union Bridge Company," that the bridge
272 is now completed, and that in Major Merrill's opinion it "is a serious and unnecessary obstruction to navigation." He recommends that "measures be at once taken to compel its owners to make such modifications as will permit the safe passage of the boats that usually navigate the Ohio up to Pittsburg." He thinks that "the injury caused by this bridge can be remedied by the removal of a part of the bridge and the insertion of a draw. This draw should give two clear openings of 120 feet each measured on the line of low water, and should be placed in any part of the bridge except that covered by the southern span. No riprap whatever should be permitted in the draw openings. Lastly, the serious damage caused by the construction of this bridge under a defective State law, without the consent of the United States, again brings up the urgent necessity of placing the subject of the bridging of all navigable waters under United States law, and of positively prohibiting the construction of any bridge over such waters without the previous approval of the plans by the Secretary of War or some other high official of the General Government."

Major Merrill's views meet with my concurrence.

Under existing laws the Secretary of War has no authority to remedy this evil.

* * * * * * *

See A. R. C. of E., 1875, Part 11, p. 684 and following.

3rd. No record has been kept of the actual damage to boats striking the piers of the bridge. The essential complaint is lack of height of bridge and if no boats could go under the bridge except small ones and those at low water, the record of actual damage would necessarily be small. Had the bridge been lower so that no boats could go under it at all, no boats would have been damaged.

4th. The question as to the location of this bridge, *i. e.*, whether in the Ohio or Allegheny river, was not considered as a pertinent subject at the hearings and was not gone into thoroughly. Still the weight of the evidence given goes to establish the fact that the bridge was built in the Ohio River. See pages 27 and 28 of the record of the second or rehearing.

5th. No reply is considered necessary to any of the allegations in this section except the last and that will be answered under the main consideration as to whether or not the bridge is an unreasonable obstruction.

273 11. So much as to allegations that in the opinion of this office have very little to do with the case, since the law in-

vests the Secretary of War with no discretion in this matter, except that of deciding whether or not a bridge is an unreasonable obstruction to navigation.

12. Fig. No. 1 (page 9) shows the highest span of the Union Bridge. It also shows the average height of the boats that ply the Ohio River, the average height of the packets that ply the Monongahela River, and the average height of the pool or harbor tow-boats, all with chimneys and whistles down. It also compares the height of these boats with the clear height of the Union Bridge at low and at high water. The above heights were submitted in the statement of Captain Wm. B. Rodgers, of Pittsburg, Pa., and from which it is seen that practically none of the boats engaged in interstate commerce from Pittsburg, South and West, can reach at low water a single manufacturing plant or wharf in the cities of Pittsburg and Allegheny on the Allegheny River. For this class of boats the bridge is not only an unreasonable obstruction but an absolute bar to navigation. That portion of the Allegheny River extending from the mouth to Brilliant Pumping Station, a distance of 6 miles, is a part of the harbor of Pittsburg, and in which there is now a sufficient depth of water for navigation, made by the Davis Island Dam, Ohio River, and the Herr Island Dam, Allegheny River, both constructed by the United States. The low water flow of the Allegheny River is about six times that of the Monongahela River, and packet boats for the Monongahela are none too large for the Allegheny. A comparison of the heights of bridge and packets will show that such boats are practically prevented from passing under the Union Bridge at a stage of water above nine feet, or above a 3 ft. stage should Davis Island Dam be converted into a fixed dam. A comparison of the relative heights of pool tow-boats and the bridge will show that such boats cannot enter the Allegheny River at a stage above 16 feet, and that no boats whatever, in use by the people of Pittsburg and vicinity can pass under the Union Bridge and seek protection in the Allegheny River during floods and ice runs in the Monongahela River. It is during such times that a harbor is needed in order to save life and property, and this bridge destroys the essential element of such a harbor by making it impossible for the shipping to go from one river to the other for protection. The moving out of the ice in the two streams forming the Ohio at Pittsburg seldom occurs at the same time. The Monongahela River rises south of Pittsburg and the Allegheny River north.

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13. In the paper submitted by James Rees & Sons, forming a part of this record, the statement is made that: "In Feb., 1877, the coal interest sustained a loss estimated at $300,000, on account of this bridge preventing them from passing from the Monongahela to the Allegheny River, and vice versa, which previously was done." When the winter's ice comes out of either the Monongahela or the Allegheny on a rising river, it often gorges and when these gorges break, all shipping is swept along with them unless it can find a harbor in the river in which the ice is not moving.

14. The facts as stated above are re-stated and corroborated in the file of papers herewith, marked Exhibit B.

15. In the paper presented by the Monongahela River Consolidated Coal & Coke Co. the following statement is made: "Lack of wharfage and harbor room are the most serious drawbacks to the greatest usefulness of the Pittsburgh harbor. If the Union Bridge were properly reconstructed, that is, made as high as the
275 Point Bridge, with wide channel passages, the wharfage facilities for Pittsburgh Harbor proper, particularly for freight and passenger service, would be almost doubled." There are enclosed photographs Nos. 1 & 24, in Exhibit D, showing the congested condition of Pittsburgh Harbor in the Monongahela River. A reference to photograph No. 68 will show that portion of the Pittsburgh Harbor in the Monongahela River crowed with shipping, while that portion in the Allegheny has none, all due to the Union Bridge barring a similar use of the Allegheny.

16. The records of the hearings together with the statements filed therewith do, in my opinion, establish the fact that the Union Bridge at or near the mouth of the Allegheny River is incontrovertably, not only an unreasonable obstruction to the navigation of the Allegheny River, but an absolute bar to the free use of the same.

17. The facts developed at the hearing show that in order to give the shipping at Pittsburgh increased harbor room and to enable it to connect with wharves and manufacturing plants in Pittsburgh Harbor on the Allegheny River, the Union Bridge should be so raised as to provide a channel span with a clear height of 70 ft., the same as exists under the Point Bridge, Monongahela River, and the same that will exist under the Wabash R. R. Bridge just being built immediately above the Point Bridge.

18. The records of the hearing show that one year's time is hardly sufficient, in view of the condition of the structural steel market, to make the changes proposed, but that 18 months is ample.

19. It is therefore recommended that the Union Bridge Co., of which James M. Bailey, c/o Phillips, Nimick & Co., Pittsburgh, Pa., is President, be given notice to make the following changes in its bridge connecting the cities of Pittsburgh and Alle-
276 gheny, at or near the mouth of the Allegheny River, by June 30, 1904, to-wit: That the bridge in question and known as the Union Bridge be so altered as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear with each; the second span from the Pittsburg shore to give a clear headroom over the Davis Island Pool of not less than 70 feet, the first span from the same shore to give a clear headroom of not less than 70 feet at the pier and 62 feet at abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and that all parts of the old structure not comprised in the new construc-

tion and in conformity with the above requirements shall be wholly removed.

Very respectfully, your obedient servant,

WM. L. SIBERT,
Captain, Corps of Engineers.

5 enc.

(Exhibits A, B, C, D, & E,—Exhibit D mailed separately.)

277 Which offer was objected to by counsel for defense as incompetent and irrelevant, and for the further reason that it does not show that the Union Bridge Company had any notice of the hearing before Maj. Sibert or before the Secretary of War. Thereupon counsel for the Government offered certified copy of notice to the Union Bridge Company of a hearing as required by the Act of March 3rd, 1899, signed by authority of the Secretary of War, William L. Sibert, captain of the corps of engineers, which said notice was served on the Union Bridge Company by J. W. Arras November the 4th, 1902, and is in words and figures following:

278 Ex. 14. 1/10/06. L. D. I.

(Form 26.)

To The Union Bridge Co., Pittsburg, Pa.

Whereas, the Secretary of War has good reason to believe that the bridge connecting the cities of Pittsburg and Allegheny, at or near the mouth of the Allegheny River, known as the Union Bridge, is an unreasonable obstruction to the free navigation of the Allegheny River and the Pittsburg Harbor, on account of insufficient height and width of span, and of wide and high riprapping at the piers.

It is proposed to require the following changes to be made in said bridge by the 30th day of November, 1903, to-wit: That the bridge be so altered as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second, or right-hand, span to give a clear headroom over the Davis Island pool of not less than 70 feet, and the first span of not less than 70 feet at the pier and 62 feet at the abutment; Also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed.

In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, at Room 409, Post Office Building, on the east side of Smithfield Street, between Third and Fourth Avenues, in Pittsburg, Pennsylvania at 10 o'clock A. M., on the 14th day of November, 1902, where and when you

will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his de-
279 cision it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

WM. L. SIBERT,
Captain, Corps of Engineers.

280 Which offer was objected to by counsel for defense as incompetent and irrelevant for the purpose offered. Objection overruled by the court. Exception noted and bill sealed for the defendant.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

The Government then to sustain the issues on its part offered testimony by Capt. W. L. Sibert, tending to prove that he was acquainted with the condition and location of the Union Bridge on January the 20th, 1903, and that he was acquainted with the same at the time of the trial, and that there had been no changes made in the Union Bridge in regard to its height or any other way, and that there had been no changes in relation to any of the changes included in the notice to the Secretary of War made by the Union Bridge Company, complying with the said order of the Secretary of War of January the 20th, 1903; that he had served the said order personally upon James M. Bailey, president of the Union Bridge Company, on the 26th day of January, 1903; that he was directed by the Secretary of War to hold a hearing in the case of the Union Bridge Company concerning a complaint made that the same unreasonably obstructed navigation; that he did hold such hearing and that there appeared at the hearing for the said Bridge Company its president, James M. Bailey, and also its attorney, W. B. Rodgers.

Thereupon plaintiff closed.

281 The defendant, to sustain the issues upon its paer, produced evidence by Henry M. Long, tending to show that it was connected officially with the bridge of the Union Bridge Company at the time of its construction, and that it was constructed in the fall of 1873 until the fall of 1874, when it was completed.

The defendant further produced testimony by A. L. Shultz tending to prove that he was a bridge engineer with experience in bridge construction since 1874; that he was familiar with the order of the Secretary of War to the Union Bridge Company dated January 20th, 1903, prescribing the changes to be made in the construction of the Union Bridge; that he was familiar with the present Union Bridge; that he had made an investigation of the bridge with a view to ascertaining the cost to the Bridge Company of a re-construction of the bridge in accordance with the specifications set forth in the order of the Secretary of War, and that such re-construction would cost to the Bridge Company about $459.325, exclusive of any land damages occasioned by the change on either side of the bridge and

along the two streets, and that in such re-construction not any of the present structure of the bridge would be utilized.

This was substantially all the testimony offered by the parties.

Thereupon counsel for defendant requested the court to affirm the following propositions of law:

282 (1.) That in the absence of any legislation by the Congress of the United States assuming jurisdiction over the Allegheny River, the power of the State of Pennsylvania to authorize the construction of any bridges that it might see fit, including the Union Bridge over the Allegheny River, was plenary; and such erection having been made under and by the State authority, the bridge is a lawful structure and the private property of the Bridge Company.

Answer: Refused.

To which answer the defendant excepts and the same is noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

(2.) The attempt in the present proceedings upon the part of the United States to compel a reconstruction or removal of the Union Bridge erected under the authority of the State of Pennsylvania, is only referable to the 18th Section of the River and Harbor Bill of the Congress of the United States, approved March 3, 1899.

Answer: Refused.

To which answer the defendant excepts and the same is noted and bill sealed.

(3.) The said 18th Section of the River and Harbor Bill of the Congress of the United States, approved March 3rd, 1899, is null and void, for the following reasons:

(*a.*) The said Act attempts to take and destroy the private property of the Union Bridge Company, without the process of law.

283 (*b.*) The said Act undertakes to authorize the taking of private property for public use without just compensation.

(*c.*) In and by the terms of the said Act, it is undertaken by the Congress of the United States to unlawfully delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army, both legislative and judicial powers, in contravention of the Constitution of the United States.

Answer: Refused.

To which answer the defendant excepts and the same is noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

(4.) The Union Bridge having been erected across the Allegheny River prior to the enactment of any legislation of the Congress of the United States assuming jurisdiction over the said river, and having, as erected, been maintained and used by the said Bridge Company and the public at large, with the consent and acquiescence of the State of Pennsylvania, and without interference or complaint

of any of the authorities of the United States until the beginning of these proceedings, the said bridge is a lawful structure and cannot be taken by the United States, either by way of requiring a reconstruction of the same or removal of the said bridge, without making just compensation to the Union Bridge Company therefor.

284 Answer: Refused.

To which answer the defendant excepts and the same is noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

(5.) That said Act of Congress makes it the duty of the Secretary of War, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge, to wit, the bridge complained against, so to alter the same as to render navigation through or under it reasonably free and unobstructed, and, in giving such notice, he shall specify the changes recommended by the Chief of Engineers that are required to be made and shall prescribe in each case a reasonable time in which to make them: Under this, the Secretary of War was required affirmatively by the act to give to the Union Bridge Company, owning the bridge in controversy in this case, opportunity to be heard by him, the said Secretary of War, before was authorized or lawfully empowered to give the notice to the said company to so alter the bridge in requirement with his order, and it appearing affirmatively in the case that the said Elihu Root, the Secretary of War, in making the order set forth in the information, never at any time give the Union Bridge Company reasonable opportunity to be heard before him, or any hearing whatsoever, the order set forth in the information, given and signed by the said Elihu Root,

285 then Secretary of War, is not a lawful order, and is null and void and not authorized by the said act.

Answer: Refused.

To which answer the defendant excepts and the same is noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

(6.) There is no evidence in the case that the Union Bridge is or at any time was an unreasonable obstruction to the navigation of the Allegheny River.

Answer: Refused.

To which answer the defendant excepts and the same is noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

286 Counsel for the United States Government requested the following conclusions of law:

First. By Section 18 of the Act of March 3, 1899 (30 St. 1153) Congress placed upon the Secretary of War the duty of determining

whether or not bridges over navigable water ways of the United States were obstructions to the navigation of such water ways. In case he complied with the requirements of the law in regard to a hearing, and fixed a reasonable time for the completion of the prescribed alterations, his notice to alter the Union Bridge, set forth in the Information filed at above number and term, was a lawful notice, and the failure to alter said bridge in accordance with said order, or to remove the said structure, if continued during the month of July, A. D. 1905, constituted the misdemeanor charged in the Information; and though the defendant orginally built said Union Bridge under color of authority of an Act of Assembly of the State of Pennsylvania, and even though the requirements of that Act of Assembly were strictly observed by said Union Bridge in constructing said bridge, such Act of Assembly would not constitute a valid defense to the Information.

Answer: Affirmed.

To which answer the defendant excepted, exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

287 2. The cost of making the alterations prescribed by the Secretary of War in his notice to the Union Bridge Company, set forth in the Information and offered in evidence, or the cost of the removal of the Union Bridge, is not a valid defense to the charge of failing to obey such order, in the absence of testimony showing the removal of the bridge, or the inability of the Union Bridge Company to remove it within the period fixed by the said notice.

Answer: Affirmed.

To which answer the defendant excepted, exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

3. Section 18 of the Act of March 3, 1899, directs the Secretary of War to give the parties in interest, to wit, the bridge owners, a reasonable opportunity to be hea-d, prior to issuing a final notice to said bridge owners, to make the alterations deemed necessary by him in order to render the bridge under consideration not an obstruction to the free navigation of the river spanned by it. Such hearing need not be held by the Secretary of War in person; and it is sufficient under the provisions of the Act if the Secretary of War had given said owners an opportunity to be heard relative to the proposed alterations, before one or more of his agents or subordinates, and the testimony or statements made at said hearing have been transmitted to and considered by said Secretary of War.

288 Answer: Affirmed.

To which answer the defendant excepted, exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

The court thereupon charged the jury as follows:

289 GENTLEMEN OF THE JURY: You have been qualified here as jurors to pass upon the issues of fact involved in this case. This case is an information brought by the United States against the Union Bridge Company, charging that Company with wilfully failing or refusing to comply with the lawful order of the Secretary of War; and it is alleged on the part of the Government that such a refusal constitutes a misdemeanor under the 18th Section of the Act of Congress of March 3, 1899, and subjects the defendant to the fines and penalties imposed by that Act.

At the conclusion of the testimony in the case, the counsel for both sides and the court seemed to agree that there were no questions for the determination of this jury, but that the ultimate issue of the case depended upon the views of the court in reference to the law governing it. It has therefore seemed proper to us, in order to dispose of the case, that we should direct you to find a verdict of guilty in manner and form as the defendant stands indicted and to return a verdict to that effect. This we do, without passing finally upon the questions of law involved in this case; but this course will enable the court to pass upon those questions at a later stage and pass upon them in a way in which the case can be ultimately reviewed by the Supreme Court of the United States.

The Union Bridge Company is a corporation of the State of Pennsylvania. It has built this bridge over the Allegheny River in pursuance of the powers conferred upon it by its charter granted
290 by the State. The Secretary of War, in pursuance of the powers vested in him by an Act of Congress, has notified the Bridge Company, after hearing the parties, that this bridge is an obstruction to navigation, and has ordered it to be altered, so as to avoid its being such an obstruction to navigation.

On the part of this Government it is contended that this is a lawful order of the Secretary of War, and, for present purposes, we instruct you that it is.

Upon the part of the defendant it is contended that this is not a lawful order of the Secretary of War, and that he is not justified under the Act, which they claim is unconstitutional, in issuing or making any such order, and that especially in view of the fact that the Act in question provides for no compensation to the defendant for the serious results that would flow from its obeying this order of the Secretary of War.

Upon these questions we express no present view. That is a matter for our later determination; and this will be raised by a motion on the part of the Government asking the court to impose sentence under this verdict of yours, and the questions raised by the defendant in this case will come before the court upon a motion in arrest of judgment. This *court*, as I have said, will enable the court, at its leisure, to review these very important questions and determine and put them in such shape that the case can be ultimately reviewed.

Counsel for both sides have submitted points upon which
291 they have asked us to instruct you. For the present we will *pro forma* affirm the points presented by the Government and *pro forma* refuse those of the defendant, and will reserve the right to specifically answer each of these several points hereafter, and to make the answers to such points a part of our present charge.

Under these instructions, therefore, gentlemen of the jury, it will be your duty to return a verdict to the Court finding the defendant in this case guilty in manner and form as it stands indicted.

292 To which charge the defendant excepted to all that part thereof wherein the court instructed the jury that the Secretary of War found the bridge to be an unreasonable obstruction, and after hearing of the parties. Exception noted and bill sealed for defendant.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Subsequently, to wit: February the 9th, 1906, the court filed the following opinion:

293 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

UNITED STATES
vs.
UNION BRIDGE COMPANY.

Sur Motion to Impose Sentence.

Sur Motion in Arrest of Judgment.

BUFFINGTON, *J.*:

This is a proceeding by the United States against the Union Bridge Company, in the nature of a criminal information, for failure to alter a bridge, which is an alleged obstruction to navigation. On the trial thereof, no issues of fact were raised; the points of law submitted by the Government were affirmed *pro forma*, those submitted by the Bridge Company denied *pro forma;* and a verdict of guilty, under the charge of the court, rendered by the jury. Motions were then made, one by the Government to impose sentence and one by the Bridge Company in arrest of judgment. In this charge the court stated an opinion would be filed later as part thereof, which is now done.

The obstruction here involved consists of a bridge over the Allegheny River just above its junction with the Monongahela at Pittsburgh. The Allegheny River rises in Pennsylvania, flows north

into New York State and thence back into Pennsylvania. The latter State, by Act of March 21, 1798, enacted the Allegheny, from the New York State line to its mouth, a navigable stream, and the State of New York, by Act of March 31, 1807, did likewise in its counties of Genesee and Allegheny. The Allegheny is the principal
294 branch of the Ohio, its volume being six times greater than that of the Monongahela. It is included in the general plan for the improvement by the National Government of local interstate water ways and the harbor of Pittsburgh. The Government has built or has now in process of construction a system of locks and dams on the Allegheny which will slackwater the stream for twenty-seven miles from its mouth. The Davis Island Dam, situate five miles below Pittsburgh on the Ohio River, raises the water in the Allegheny and Monongahela at their junction six feet above their normal depths and backs its water to the first dams of the Allegheny and Monongahela slackwater systems respectively. These waters form the harbor of Pittsburgh, the importance of which harbor will be appreciated from the fact that the tonnage in water transportation passing from it the past year exceeded that of the Suez Canal for the same period. From its size, inter-state relation and its being a part of this really great harbor, it will be seen that the Allegheny answers the requirement of a navigable stream, The Mortello, 78 U. S., 411, and is also one over which the National Government has assumed jurisdiction. The Union Bridge is a pier-supported, wooden structure; it crosses from Pittsburgh to Allegheny City; and is the first bridge on the Allegheny. It was built in 1874-1875 by the Union Bridge Company, a corporation chartered by the State of Pennsylvania, March 13, 1873, and was opened for travel July, 1875.

In pursuance of the agreement of counsel at the argument that all Federal Acts pertinent to the cause should be considered by the Court we have examined the Federal legislation affecting the Allegheny River prior to the building of this bridge. By the Act
295 of April 30, 1824, Congress inaugurated the system under which appropriations were annually made providing for surveys and the report thereof to Congress during the period later referred to herein, viz., from 1828 to 1838. That Act provided: "That the President of the United States is hereby authorized to cause the necessary surveys, plans, and estimates, to be made of the routes of such roads and canals as he may deem of National importance, in a commercial or military point of view, or necessary for the transportation of the public mail;" By virtue of this Act, Congress by resolution of December 9, 1828, authorized the examination of "the Allegheny river from the City of Pittsburgh to the mouth of French Creek, at Franklin, with a view to a slackwater navigation." Such survey, a distance of one hundred and twenty-one miles, was made by the War Department and the report thereof made, which survey and report were on June 8, 1832, reported to Congress and form H. R. Document No. 265 of the First Session of the 22nd Congress. This report showed the river could be made navigable to Franklin for a four and a half foot stage, all the year around, by a slackwater system, for eighty-five ton boats, which the report states

was the type in use on the Ohio. By H. R. Document No. 343, Second Sessions of the 25th Congress, it appears that another survey was made in 1836-1837, in pursuance of a resolution of Congress and the same was reported to that body on March 23, 1838. This survey was an inter-state one. It began in Pennsylvania, extended through New York State and thence to connect with the prior survey, in all a distance of two hundred and seventy-four miles. An examination of the report of the War Department Engineers shows that this survey was made in pursuance of a plan to connect the
296 great river system of the west and southwest with the New York State canals then building. In that report the present navigation of the Allegheny was illustrated by the draft and capacity of the steamboat New Castle then engaged in that river trade. "This steamboat," the report says, "has carried and towed sixty tons. She has carried eighty passengers and three hundred and fifty bushels of coal and drew two and a half feet water * * * The steamboat New Castle has ascended, without great difficulty from Pittsburgh to Olean, and could even, under present circumstances, make regular trips between these places whenever there is sufficient depth of water to pass the chutes of the various dams which have been illegally erected across the river by individuals, to the serious injury of the navigation." The navigable depth to be obtained by the improvement of the Ohio was considered the desired standard for the Allegheny and confidence was expressed that, "There is no longer a doubt of the practicability of deepening the channels of the Ohio River on the bars, so as to afford at least 3½ feet water at its lowest stage from the Mississippi to Louisville. * * * It is a navigation equal to this and upon the same plans, as near as circumstances will permit their application," the report stated, "that we wish to secure to the Allegheny river; and I entertain not the slightest doubt of the entire practicability of the undertaking." It will thus be seen that in this project, which had in view connecting the canal system of New York with the entire river system of the west and southwest, the Allegheny River was an importance inter-state link, for, as the report stated, "if the Allegheny river should be improved from Olean to Pittsburgh, a water communication is opened for a distance of more than twelve thousand miles, extend-
297 ing far into the heart of one of the most fertile regions of the globe." The report shows that the notes, maps, profiles and plans of this work were burned and no steps were taken toward slackwatering the stream until shortly after the Union Bridge was built; but this early work by Congress evidences an assumption by the National Government, at least to the extent of survey and examination, of jurisdiction over the Allegheny as a proper subject of inter-state navigation improvement.

It will also be noted that the use of the Allegheny was included by the Government in its plans for the creation of a deep water harbor for Pittsburgh. This is fully set forth in the report of Major Merrill of December 2, 1874, found in Chief of Engineers' report of 1875, vol. 2, p. 687. Briefly stated, that report shows a public agitation for many years for a deeper harbor for Pittsburgh; long study and

investigation as to the proper type of dams by the War Department Engineers; the approval of the movable dam system; the determination to place such a dam so as to slackwater the harbor and the necessity of using the Allegheny for such harbor. The movement culminated in the passage of the Act of March 3, 1875, by virtue of which the Davis Island experimental dam, then and still the largest movable dam built, was constructed and forms the harbor of the City. In view of the public interest and agitation over this proposed improvement; the fact that the Allegheny was to be used as part of the harbor, the deterrent effect of the public notice by the engineer in charge, referred to hereafter in Judge Taft's opinion, that this bridge would obstruct navigation, becomes more significant.

By the Act of Congress of March 3, 1899, it was provided
298 as follows: "That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable water ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so as to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time, the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month
299 such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed. Provided, that in any case arising under the provisions in this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

The proceedings in this case were had under this Act and as their regularity, their conformity thereto and the fact that the Bridge Company had a legal hearing thereunder, are questioned,

we deem it proper to here recite such proceedings *in extenso*. Under date of August 1902, sundry citizens, corporations and associations in and about Pittsburgh, presented a petition to the Secretary of War, setting forth the incorporation of the Union Bridge Company by the State, the building of the bridge in question alleging it was an unreasonable obstruction to the navigation of the Ohio, Monongahela and Allegheny Rivers and praying him to investigate. It was, moreover, suggested that on such investigation, action be taken against the owners of the bridge in accordance with the Act above quoted. After presentation thereof to the Secretary, the petition was, on September 23, 1902, referred for report to W. L. Sibert, Captain of the Corps of Engineers in charge of Government work in the Pittsburgh district. On October 13, 1902, Captain Sibert, in response thereto, reported, among other things, to the Chief of Engineers, the location, height and pier-riprapping of the bridge; that it was an unreasonable obstruction to navigation; and suggested that the interests of
300 navigation "demand that this bridge shall have a channel span giving a clear height of 70 feet above the pool made by the Davis Island Dam. This height is necessary at the Union Bridge in order to make a harbor at Pittsburgh for its immense shipping." On October 16, 1902, the petition and the report of Capt. Sibert were returned to the Secretary of War by the Chief of Engineers with the statement, "I recommend that the papers be returned to Capt. Sibert with instructions to hold a public hearing, after due notice to all interested parties, as required by the law and the orders of the War Department on Sept. 16, 1891." On October 18, 1902, this recommendation was approved by the Secretary of War and on October 23rd a reference to Capt. Sibert was ordered. Pursuant thereto notice of such hearing was given to all interested parties, that to the Union Bridge Company being served on November 3, 1902, reading as follows: "Whereas, the Secretary of War has good reason to believe that the bridge connecting the cities of Pittsburgh and Allegheny, at or near the mouth of the Allegheny River, known as the Union Bridge, is an unreasonable obstruction to the free navigation of the Allegheny River at the Pittsburgh harbor, on account of insufficient height and width of span, and of wide and high riprapping at the piers, it is proposed to require the following changes to be made in said bridge by the 30th day of November 1903, to wit: That the bridge be so altered as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second, or right-handed, span to give a clear headroom over the Davis Island pool of not less than 70 feet, and the first span of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no
301 riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island Pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be

wholly removed. In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, at room 409, Post Office Building, on the east side of Smithfield Street between Third and Fourth Avenues, in Pittsburgh, Pennsylvania, at 10 o'clock, A. M., on the 14th day of November, 1902, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision it will perhaps best suit your purpose to submit in writing whatever you may wish to present." Hearings were had on the day fixed, and subsequent adjournment, which were attended by the Union Bridge Company through its attorney and several of its officers, by parties and counsel representing railroad and passenger bridges crossing the Allegheny farther up stream, by commercial bodies of Pittsburgh, by persons and companies engaged in river transportation and by counsel for the City of Pittsburgh. From the minutes it appears that at the opening of such hearing, Capt. Sibert announced its objects were: first, to ascertain the fact whether this bridge was an unreasonable obstruction to navigation; second, whether the changes presented in the notice of hearing are such as navigation interests demand; third, whether the time specified in which the changes should be made is reasonable. At the hearing the Bridge Company pre-
302 sented an answer in which it stated, *inter alia*, "the proposition embodied in the notice from the Government will require the removal of the present structure. If carried out it will result in the entire suspension of the operations of this company, because the investment cannot yield any adequate return for the capital." No question or issue of the bridge being an obstruction to navigation was raised by the answer. Attention being specially called to this, the Bridge Company, through its counsel, stated, "I purposely omitted that because I thought it was a question largely in the discretion of the Government, and as I said, I did not care to occupy an antagonistic position, but to suggest our situation to the Government," and in passing it will be noted that no effort was made by the Bridge Company to question then or at the jury trial the fact that this bridge was an unreasonable obstruction to navigation. On December 8, 1902, Capt. Sibert returned to the Chief of Engineers a record of his proceedings, together with a recommendation of a notice to alter the bridge to be given the Bridge Company. This recommendation was approved by the Chief of Engineers and adopted by the Secretary of War, Hon. Elihu Root, who on January 20, 1903, issued an order which was served on the Bridge Company on January 26, 1903, as follows: "Take notice that, Whereas the Secretary of War has good reason to believe that the bridge of the Union Bridge Company, a corporation existing under the laws of the State of Pennsylvania, across the Allegheny River, and connecting the cities of Pittsburgh and Allegheny, Pennsylvania (said bridge being known as the Union Bridge), is an unreasonable obstruction to the free navi-

gation of the said Allegheny River (which is one of the navigable water ways of the United States) on account of insufficient height and width of span, and of wide and high riprapping at
303 the piers; And whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation under it reasonably free, easy and unobstructed, to-wit: Alter said bridge so as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second span from the Pittsburgh shore to give a clear headroom over the Davis Island pool of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed. And whereas, eighteen (18) months from the date of service of this notice is a reasonable time in which to alter the said bridge as described above; Now, therefore, in obedience to, and by virtue of Section 18, of an Act of the Congress of the United States entitled, 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, I, Elihu Root, Secretary of War, do hereby notify the said Union Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before the expiration of eighteen months from the date of service hereof." The Bridge Company took no steps to alter, change or remove the bridge and in this shape the matter rested until July 23, 1904, three days before the expiration of the eighteen months' time provided in the notice, when its counsel presented a petition to the then Secretary of War, Judge Taft, describing itself therein as the Union Bridge Company "owning and
304 operating the Union Bridge, over the Allegheny River at Pittsburgh, Pennsylvania, under and by virtue of the authority of the United States Government," setting forth the making of the order to alter, that it would expire July 26, 1904, and praying such time be extended and a day fixed to present reasons for a rehearing. In pursuance of this petition, the Secretary of War, having temporarily suspended from time to time the order to alter the bridge, heard the arguments of counsel for the Bridge Company and thereafter, on July 21st, 1905, delivered an opinion as follows: "The Union Bridge is an unreasonable obstruction to commerce of the Allegheny River. If the bridge were not there, the winter refuge which the stretch of the Allegheny River up to the next bridge would offer for the fleet of boats, which usually are moored in the Monongahela would be a very great advantage for the navigation and commerce on the Ohio River and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in different sections of the country, have their icebreaks at different times in the early spring. The mouth of the one offers

very desirable refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The Union Bridge at the mouth of the Allegheny was erected at a time when the Secretary of War was not given specific control over navigable streams, and was not authorized to inhibit the construction of bridges which were likely to obstruct navigation, but it appears that an army engineer, Colonel Merrill, in charge of the district, publicly announced that this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the Government. These are the facts that I find independently of any previous adjudica-
305 tion; but added to this, is the finding of my predecessor, Mr. Root, to exactly the same effect, upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before me on a petition for rehearing of Mr. Root's order. As an original question I should have ruled as Mr. Root ruled, and a *fortiori,* because the orders of this Department are not to be lightly set aside, and are to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake. The petition for rehearing is denied, and the order suspending the operation of Mr. Root's order is now revoked. The order will be put in full force and executed by the proper officers, and the Union Bridge will be notified accordingly."

In pursuance of these directions notice was duly served on the bridge officers.

From these recited facts it is clear that the Bridge Company had notice of the hearing, that it duly appeared, that on hearing and rehearing its rights were considered, and that in pursuance of due action by the Secretary of War taken in the premises it has been determined that the bridge is an unreasonable obstruction to navigation.

These proceedings being regular and in conformity with the Act, three questions arise, viz., first, had Congress a right to determine what is an unreasonable obstruction to the navigation of an inter-state river; second, could it delegate such power to the Secretary of War; third, is the Act of Congress in question unconstitutional, because it provides no compensation to the Bridge Company? The settlement of these questions is of grave import. On the one hand stand the people at large, represented by the National Government, who are interested in the preservation, improvement and
306 maintenance of the water ways which nature made highways of commerce; on the other hand, we have investors, who in pursuance of State corporate authority have built bridges across such highways and invested their funds therein. The country's growth and the expansion of commerce have made these bridges an unreasonable obstruction to navigation, but the bridge owner says to the Government, unless you pay for the structure, you cannot remove the obstruction. On the other hand, the Government says to the bridge builder, you cannot stay a great national power, or cripple its use by making its exercise unduly costly, by building

without Government sanction bridges on the very ground you knew the Government must use when it came to exercise its constitutional power to improve these water ways for the general good.

But before taking up these contentions, let us first ascertain the facts pertinent to this particular case, and especially the relation of this Bridge Company to the State of Pennsylvania, under charter from which the obstructing bridge was built and under which alone its existence is justified. Now it will be noted that this charter left the exact location of a bridge to the option of the Company, simply authorizing it to build one "over the Allegheny river, at any practicable point on Duquesne Way, between Second Street and the Monongahela river and Allegheny avenue, or any other practicable point in the City of Allegheny." Neither did it prescribe the kind of bridge, its height, its span-width or pier-location. All these matters were left to the Company, but this general right to build a bridge was granted on the express condition and limitation inserted by the State in its charter, "That the erection of said bridge shall not obstruct the navigation of said river, so as to endanger the
307 passage of rafts, steamboats or other water crafts; and the piers shall not be so placed as to interfere with tow boats proceeding out with their tows made up, and shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation." No Government or State approval of the bridge, prior to its erection, is shown or alleged. In Dugan *vs.* Bridge Company, 27 Pa. St. 310, a charter having a provision of this general character, was under consideration and it was there said by the Supreme Court of Pennsylvania: "In measuring corporate rights, we are to look at all the terms employed in the fundamental law or compact. We can no more cut out some of them or mitigate their legal effect because they are in a proviso, than we could qualify the terms of a private agreement because found in one part of the instrument instead of another. The whole instrument is to be taken together as expressing the final intentions and purposes of the parties. When the legislature tells a company, you may erect a bridge over a particular stream, provided you do not impair the navigation thereof, it is for the company to determine whether they will accept the franchise on such a condition; but if they accept it, they take it *cum onere*, and, having no rights outside of their charter, they must enjoy their franchise, subject to that condition or not enjoy it at all." But this prohibition against the bridge obstructing navigation thus expressed by the States in its charter was nothing more than the obligation the laws and decisions of that State imposed by implication. Prior to the adoption of the Federal Constitution, the Province of Pennsylvania, by Act of August 14, 1725, provided, "That no bridge, frame or device whatsoever
308 shall at any time to come be made, erected, upheld, sustained or repaired, over any creek or river within this province, navigable for any sloop, shallop, flat, or other craft, that shall or may (in) anywise stop or hinder the navigation of any such sloop, shallop, flat or other craft or floats of logs; any law, custom or usage to the contrary notwithstanding." And the special care which

Pennsylvania exercises to preserve its waterways from obstruction is seen in Dugan *vs.* The Bridge Company, *supra,* wherein it was said: "The navigation of the streams of a country is a great public interest, and the law has always treated obstructions as *public nuisances.* In Rex *v.* Clark, 12 Mod. 615, Ch. J. Holt said, that to hinder the course of a navigable river was against Magna Charta; and many subsequent statutes have punished it, in England, with specific penalties. In this country, and especially in Pennsylvania, the navigation of our rivers has been sedulously guarded both by legislative action and judicial opinion." Moreover, the courts of that State have held in the case last quoted that a duty is imposed on a bridge company to keep pace with the expansions of commerce and so change or alter its bridge as not to obstruct such enlarged commerce, saying: "The legislature must be presumed to have had all the natural growth of this trade (coal) in view when they authorized the bridge. * * * We are enabled to say that the true meaning of the Act of incorporation is that the bridge was to be so built as not to injure, stop or interrupt the navigation, either then or now, whether in its infancy or full growth." In view of these holdings it is clear that this bridge has no warrant or countenance from the State of Pennsylvania to justify its further continuance if it be an obstruction to navigation. Such being
309 the case we pass to the next question—has Congress a right to determine what is an unreasonable obstruction to the navigation of an inter-state river?

By Section 8, Article 1, of the Constitution, it is enacted that "Congress shall have power * * * to regulate commerce * * * among the several states * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." In The Wheeling Bridge Case, 18 Howard 425, it was decided that Congress had such power and that its enactment that a certain bridge was not an obstruction to navigation was in effect a vacation of a previous decree of the Supreme Court of the United States that such a bridge was an obstruction. This decision was approved in the later case of South Carolina *vs.* Georgia, 93 U. S. 13, where in discussing it the court said: "There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, *in the judgment of the law,* an obstruction of navigation. * * * The case of The Clinton Bridge, 10 Wall. 454, is in full accord with this decision. It asserts plainly the power of Congress to declare what is and what is not an illegal obstruction in a navigable stream." To the same effect are Gray *vs.* Chicago, 27 U. S. 454, and Miller *vs.* New York, 109 U. S. 393, in the latter of which it is said: "Having power to regulate commerce with foreign nations and among the several states and navigation being a branch of that commerce, it (Congress) has the control of all navigable waters between the states or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so
310 far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive." Indeed the power of

Congress to regulate navigation being established—Gibbons *vs.* Ogden, 8 Wheaton 1; Gilman *vs.* Philadelphia, 3 Wall. 713—and Congress having the constitutional right to make all laws necessary and proper for carrying into execution its powers, it would (apart from all controlling decisions) seem that in Congress must necessarily vest the power to determine what obstructs navigation, for unless it have power to determine what obstructs, it is without power to control and regulate navigation. And indeed, whether a thing obstructs navigation or not is a question not of law but fact: "What does encroach on or straiten the harbor, or lessen the depth of water and navigation, is a fact, *questio facti*, 10 Price 374," says Mr. Justice Woodbury in United States *vs.* New Bedford, 1 Woodb. & M. 401; Fed. Cases No. 15, 867. It would therefore follow that Congress would have the power, with the effectiveness of a judicial decree, to determine what is an obstruction to navigation, or as was said in The Wheeling Bridge case, *supra*, "The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation."

Seeing then the clear right of Congress to determine what obstructs navigation, we next inquire whether if having enacted that certain obstructions in certain waters shall be removed, it is restricted to itself determining where such obstruction exist and is without power to call to its aid other aids or agencies in that regard. The broad and general power to regulate commerce being vested in Congress and that without any limitations as to the means or
311 manner in which it shall be done, the grant would seem to carry with it the implied right to employ every agency needful to the due exercise of the power: "It is a general principle of law in the construction of all powers of this sort, that where the end is required, the appropriate means are given;" United States *vs.* Bailey, 9 Peters, 255. Indeed, to strip Congress of the right to resort to departmental aid and professional engineering skill and to restrict the exercise of its powers in that regard to express legislation affecting each particular case would be practically prohibitive of all legislation on the subject. The objections to such a course are well stated in United States *vs.* Moline, 82 Fed. Rep. 592, where it is said: "The first question (is the bridge an obstruction to navigation) is purely administrative and is one that Congress can certainly delegate to the Secretary of War. A thousand questions of equal moment to the parties interested and of equal difficulty are necessarily delegated to the great departments of the government every month. In the very nature of things Congress cannot dispose of them. A Government of the size of this, operated upon such a conception, would be clogged immediately." To the same effect is Chatfield *vs.* New Haven, 110 Fed. Rep. 792. And in Miller *vs.* New York, 109 U. S. 395, it was said: "The execution of a vast number of measures authorized by Congress and carried out under the direction of heads of Department would be defeated if such were not the case. The efficiency of an Act as a declaration of legislative will must of course, come from Congress, but the ascertainment of the contingency upon which the

Act shall take effect may be left to such agencies as it may designate."

Reference may also be made to South Carolina *vs.* Georgia,
312 93 U. S. 13, which recognized the action of the Secretary of War in completely closing one channel of the Savannah River by a crib and forcing the water into another channel under a general grant of money "for the improvement of the harbor of Savannah," as an authorization of such work by Congress. Of course, it must be conceded that the power to legislate, that is, to say what the law is, is vested in Congress alone, but by the Act now before us Congress did not delegate to the Secretary of War any power to fix or make the law. By this general Act Congress itself enacted what should be done when an obstruction existed and all the power conferred on the Secretary of War was to determine when the law should be enforced; and that this authority should not be abused, a party considering himself aggrieved is by the Act given a direct appeal to the court of highest resort. That administrative duties in carrying out legislative powers may be delegated to Departments has been held in many cases, among which we cite: Field *vs.* Clark, 143 U. S. 649; Caha *vs.* United States, 152 U. S. 212; Bushnel *vs.* Leland, 164 U. S. 684; Railway Co. *vs.* Ohio, 165 U. S. 365; United States *vs.* Ormsbee, 74 Fed. 207; Grady *vs.* United States, 98 Fed. 239; Dastervignes *vs.* United States, 122 Fed. 35.

It being shown then that Congres has power to control navigation, that the Allegheny is an inter-state, navigable stream, that Congress has assumed control over it, that acting by the Secretary of War it has determined the bridge in question to be an obstruction to navigation and ordered its alteration, and the Bridge Company having wilfully refused so to do, the burden of justifying a further continuance of that which the supreme lawmaking power of the
313 land has determined to be an obstruction to navigation rests upon the Bridge Company so obstructing. That the bridge is an obstruction to navigation is now settled and is not now open to question; indeed, no question in that regard has even been raised in the whole proceeding, either on the hearing in pursuance of the statute or on the criminal proceeding in this court. It therefore having been legally determined that the Bridge Company maintains an obstruction to navigation and so fails to "meet the requisitions of the law in regard to the obstructions of navigation," it can claim no immunity or protection from the State of Pennsylvania, whose charter required that its bridge "shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation."

But it is contended, the Act of Congress under which this proceeding is had is unconstitutional because it makes no porvision for compensation and therefore violates the Fifth Amendment to the Constitution, which enacts, "nor shall private property be taken for public use without just compensation." In this connection it should be noted that the financial loss sustained by this company is not in point of fact of the serious character that would at first sight appear. It has a wooden bridge some thirty years old. In the natural life of such a structure it would not have been long, were the Government

taking no steps before the company would have to replace it and expend a large sum of money in so doing. It will thus be seen that the actual loss to the company is not the cost of erecting a new and modern bridge, but simply the profit arising from tolls during the life of its present structure. Moreover, the case does not fall within the literal terms of the constitutional provision in that no "private property (is) * * * taken for public use." The facts
314 are not as they were in the case of the Monongahela Navigation Company *vs.* the United States, 148 U. S. 312; its bridge is not taken and used by the Government for public purposes, as were the dams and locks of the navigation company in that case. Indeed, the right of the Bridge Company to maintain a bridge and to collect tolls thereon is not denied, must less taken, and the effect of this proceeding is not to take or condemn it's property, but is simply to compel the company to so use its property as not to interfere with the right of the public to an unobstructed use of the stream. It is simply the enforcement of the time honored maxim which qualifies the absolutism of all property rights: *sic utere tuo ut non alienum lædas.* It would be a strange anomaly that a demand made by the law upon one to perform a lawful duty must be preceded by compelling the law enforcer to provide compensation to the law violator for what is maintained in violation of law. It seems to us the statement of such a proposition is an answer to a claim for compensation. There can be no lawful compensation for an unlawful structure. But waiving its charter condition and the duty this Bridge Company owes to the State of Pennsylvania, under which alone it justifies, the maintenance of this obstruction, we think the paramount right of Congress to require the alteration without compensation, of any bridge obstructing navigable inter-state waters is, under the decisions of the Supreme Court, clear. In the first place we have a law, enacted by a co-ordinate branch of the Government, in which there is no uncertainty; it is directed against all bridges, those already built or to be built: "any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable waterways of the United States," are its words.
315 There can be no doubt of the clear legislative intent to compel alterations of such bridges as obstruct, and that without compensation. Shall this law be set aside as unconstitutional? The question is one of serious import from a National standpoint, for it is clear that if an obstruction must be paid for before navigation can be improved, the improvement of navigation faces a grave menace. Unfortunately as this might be, still, if the enforcement of any Act of Congress sacrifices the constitutional right of the citizen, the Act must yield to the higher law of the constitution. But when a statute has been passed by the legislative branch of the Government, the judicial branch will act with great caution in declaring it unconstitutional, and will do so "only," as Chief Justice Black of Pennsylvania said in Sharpless *vs.* The Mayor of Philadelphia, 21 Pa. St. 164, "when it violates the constitution clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds." Or as Chief Justice Marshall said, in Fletcher *v.*

Peck, 6 Cranch 126: "The question, whether a law be void for its repugnancy to the constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transacted its powers, and its act to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Now in passing this law and thereby seeking to fulfil its constitutional duty
316 to regulate commerce Congress would properly be guided by the holdings of the Supreme Court in reference to that power. As we study those decisions it would seem the views of that court are stated in no certain terms. Turning as we naturally do to the fountain head of American constitutional construction, we find the dominant power of Congress in that regard was asserted at an early day by Chief Justice Marshall in the case of Willson *vs.* Black Bird Creek Marsh Company, 2 Peters 245. There a corporation, under authority of a charter from the State of Delaware built a dam across the navigable water in question. A vessel owner broke down the dam and sought to justify his act on the ground that it was an obstruction to navigation. His contention in that regard was not sustained, the court holding that the dam, having been built by authority of the State of Delaware, was, in the absence of legislation by Congress, a lawful structure. But in delivering its opinion the court went further and said: "Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this Act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the Government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations, and among the several states.' If Congress had passed any Act which bore upon the case; any act in execution of the power to regu-
317 late commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and lower states; we should feel not much difficulty in saying, that a state law coming to conflict with such act would be void. But Congress has passed no such act." We cannot but regard this statement of the great Chief Justice at that early day—1835—a statement, it will be observed, not necessary to the disposition of that case—was purposely inserted to prevent any misunderstanding and as a timely warning to those who might thereafter act under state sanction in placing structures in streams, that they were doing so in the fact of a

dominant, controlling power in Congress and that when that dormant power was exercised all else must yield thereto; that the structure might lawfully be placed there for the time being by State power, but that structures, thus State authorized, might become obstructions, nationally abated, when Congress exercised its dormant, but none the less dominant power, to regulate commerce. And this early assertion of paramount Federal control is made in all the later cases where the power is discussed. In them will be found the assertion that the right, when Congress acts, is not concluded by anything the States or individuals acting under them, have done; that the power of Congress is not affected by its silent acquiescence or inaction; that it may remove offending structures. Thus the absolute scope of this power when Congress undertook to exercise it is asserted in Williamette Iron Bridge Company *vs.* Hatch, 125 U. S. 1, where the court say: "And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, *it is not concluded by anything that the states or that individuals*
318 *by its authority or acquiescence have done, from assuming entire control of the matter, and abating any erections that may have been made,* and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams." In Escanaba Company *v.* Chicago, 107 U. S. 683, the power of the state, in the absence of congressional legislation to maintain and regulate bridges over inter-state navigable waters was recognized. But the dominant control of Congress and the right to abate State-authorized structures when they obstructed navigation was vigorously asserted. Says Mr. Justice Field: "Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the City of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And no where could the power to control the bridges in that City, their construction, form and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the City upon whom it has devolved that duty. *When its power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction.* If the power of the State and that of the Federal Government come in conflict the latter must control and the former yield. This necessarily follows from the position given by the constitution to legisla-
tion in pursuance of it, as the supreme law of the land. But
319 until Congress acts on the subject the power of the state over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest periods, and approved in repeated cases, the most notable of which are Willson *vs.* Black Bird Creek Marsh Company, 2 Pet. 245, decided in 1829, and Gilman *v.* Philadelphia, 3 Wall. 713, decided in 1865." To the same effect is the case of Gilman *v.* Philadelphia, *supra,* where, long prior to the

building of this bridge, it was said: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. (Gibbons *v.* Ogden, 9 Wheaton, 1); Cornfield *v.* Coryell, 4 Washington C. C. 378). This necessarily includes the power to keep them open and free from any obstruction to their navigation, *interposed by the state or otherwise;* to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes Congress possesses all the powers which existed in the states before the adoption of the national constitution, and which have always existed in the parliament in England. It is for Congress to determine *when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided.* United States *v.* New Bedford Bridge, 1 Woodb. & Minot, 420, 421; United States *v.* Coombs, 12 Peters 72; New York *v.* Milne, 11 *Id.* 102, 155). * * * Lastly, Congress may interpose whenever it shall be deemed necessary by general or
320 special laws. It may regulate all bridges over navigable waters, remove offending bridges and punish those who shall thereafter erect them. Within the sphere of their authority both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the constitution, and is abnormal and revolutionary." In Pound *vs.* Turck, 95 U. S., 459, a dam and boom were placed in the Chippewa River in pursuance of authority granted by the State of Wisconsin. The plaintiff was injured by the obstruction but the defendant justified, in the absence of congressional legislation, under the state law. The defence, as in the Marsh Creek case was held good, but just as in that case the court took occasion to assert the paramount control of Congress when it saw fit to exercise such control, saying: "There are within the state of Wisconsin, and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of congress to interfere and control the matter whenever it may be necessary to do so, the exercise of this limited power may all
321 the more safely be confided to the local legislatures." So also in Cardwell *vs.* American Bridge Co., 113 U. S. 205,

while the limited power of the state to control and maintain bridges is recognized, yet the dominant power of congress to control those so authorized is broadly asserted. Referring to the decisions cited, the court says: "They recognize the full power of the states to regulate within their limits matters of internal police, which embrace, among other things, the construction, repair and maintenance of roads and bridges. * * * And that, as to bridges over navigable streams, their power is subordinate to that of congress, as an act of the latter body is, by the constitution, made the supreme law of the land; but that until congress acts on the subject their power is plenary. When congress acts directly with reference to the bridges authorized by the state, its will must control so far as may be necessary to secure the free navigation of the stream."

The argument is, however, advanced that the Government having made no objection to the bridge prior to its erection has, in some way, by its inaction legalized the bridge as against itself and thereby become liable to compensate the owners before ordering its alteration. We are referred, however, to no principle of estoppel or laches that would avail to thus compel the holder of a discretionary power to exert it immediately at peril: "It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided;" Gilman *vs.* Philadelphia, *supra*, and cases therein cited. And indeed, to apply an analogous principle—statutes of limitations do not affect the sovereign's
322 rights. If one at his own instance or acting under authority of a State, should in the absence of any inducing action by the Government, occupy land of the letter and place improvements thereon, manifestly such unauthorized improvement would be no bar to the Government abating or removing the same when it saw fit to assert its dominant power. The laches, if any, are not those of the Government, but of the improver who neglected to secure prior Federal consent: "It is for this reason, namely, the ultimate (though yet unexerted) power of congress over the whole subject matter, that the consent of congress is so frequently asked to the erection of bridges over navigable streams;" Williamette Iron Bridge Co. *vs.* Hatch, *supra*. And not only, as we have seen, was consent of Congress as a precautionary measure not obtained, but the relation of the Government to this stream and the harbor of Pittsburgh were then such as might well admonish a prudent investor proposing to bridge the stream and narrow the harbor to acquaint himself with the plans of the Government before starting such an undertaking: "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it;" Kennedy *vs.* Greene, 3 Myl. & K. 722, quoted in Wood *vs.* Carpenter, 101 U. S. 141, and "Means of knowledge with the duty of using them are deemed equivalent to knowledge itself, and passive good faith will not serve to excuse wilful ignorance;" 21 Am. & Eng. Ency. Law, 584, and cases cited. In the County of Mobile *vs.* Kimball, 102 U. S. 698, the subject of improvements in the line of commerce and there-

fore of navigation made under State authorization was considered. The distinction was drawn between those of a general nature,
323 which in the nature of things must, in order to ensure uniformity, be left solely to Congress and those, "where from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated." It was there held that "the improvement of harbors, bays and navigable rivers within the State falls within this last category of cases," and in that case there being no action by Congress on the subject, legislation by the State of Alabama providing for the improvement of the harbor of Mobile was held legal. But while the State control thus assumed was recognized the court laid down the principle that the inaction of the Congress was not a surrender of the power or a declaration that nothing shall thereafter be done for Congress. "State action," says the court, "upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority."

Under these authorities, we are of opinion that Congress was acting within its constitutional limits in enacting that bridges, whenever they obstructed navigation, should be removed, and that without compensation made to the obstructor. The absolute, dominant, controlling power of Congress over navigation had been asserted
324 before this bridge was built. While the power of the State to authorize structures was recognized, yet the limited nature of that power and that it must be exercised and enjoyed subject to the dominant control of the constitutional, and therefore higher, power, had been as clearly pointed out, so that when the State of Pennsylvania empowered this company to build its bridge so that it should "meet the requisitions of the law in regard to the obstructions of navigation," there was no doubt as to the source from which those requisitions would ultimately come. In this case Congress has acted, as it strikes us, with great magnanimity and with considerate regard to the situation in which this company itself placed itself. In 1874, the Government's engineers reported to it, vol. 2, Chief of Engineer's Report, p. 686, that the bridge was an obstruction as follows: "Below the Saint Clair street suspension bridge was a space of 3,000 feet, with excellent water at all stages. This space was always occupied by steamboats, to the great relief of the main harbor in the Monongahela, which is usually excessively crowded with coal tow-boats and barges. This use of the Allegheny has been entirely destroyed by the Union Bridge, as large boats cannot get under the bridge in any stage of water, and small boats cannot do so when the water is above average stages. * * * To thoroughly utilize this improved harbor it is essential that first class boats should be able to traverse the Allegheny and Monongahela harbors with freedom. But the Union

Bridge entirely closes up the mouth of the Allegheny and thus destroys half of the benefit to be derived from the proposed improvements. * * * In view of all these facts I am constrained to report that the Union Bridge is a serious and unnecessary
325 obstruction to navigation, and to recommend that measures be at once taken to compel its owners to make such modifications as will permit the safe passage of the boats that usually navigate the Ohio up to Pittsburgh." Indeed that Congress, in the face of such information, has allowed this bridge to stand for thirty odd years thereafter and be used meanwhile to reimburse to that extent its owners by tolls; that during that time the bridge has precluded the use of half the expensive harbor improvements made by the Government, are in themselves proof that an absolute power in Congress to remove obstructions to navigation, when it saw fit to exercise the power, was wisely entrusted to that body in full confidence that such power would be exercised with due regard to the situation in which the obstructor had placed himself.

Holding then, as we do, that this law is constitutional, the proceedings under it regular and the verdict of the jury warranted, we dismiss the motion in arrest of judgment and grant the motion of the Government to impose sentence.

326 To which said opinion counsel for the defendant filed the following exceptions:

327 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

UNITED STATES
v.
UNION BRIDGE COMPANY.

The defendant, by its counsel, excepts to those portions of the charge of the Court hereinafter specified as follows:

First. "This is a proceeding by the United States against the Union Bridge Company, in the nature of a criminal information, for failure to alter a bridge which is an alleged obstruction to navigation. On the trial thereof, no issues of fact were raised."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Second. "The Allegheny River rises in Pennsylvania, flows north into New York State and thence back into Pennsylvania. The latter state, by Act of March 21st, 1798, enacted the Allegheny, from the New York State line to its mouth, a navigable stream; and the

State of New York, by Act of March 31st, 1807, did likewise in its Counties of Genesee and Allegany."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Third. "The Allegheny is the principal branch of the Ohio, its volume being six times greater than that of the Monongahela. It is included in the general plan for the improvement by the National Government of local interstate water ways and the harbor of Pittsburgh."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

328 *Fourth.* "The Union Bridge is a pier-supported, wooden structure; it crosses from Pittsburgh to Allegheny City, and is the first bridge on the Allegheny. It was built in 1874-1875 by the Union Bridge Company, a corporation chartered by the State of Pennsylvania, March 13, 1873, and was opened for travel July, 1875."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Fifth. "By the act of April 30, 1824, Congress inaugurated the system under which the appropriations were annually made providing for surveys and the report thereof to Congress during the period later referred to herein, viz., from 1828 to 1838. * * * By virtue of this act Congress by resolution of December 9, 1828, authorized the examination of 'the Allegheny river from the city of Pittsburg to the mouth of French Creek, at Franklin, with a view to slackwater navigation.' Such survey, a distance of one hundred and twenty-one miles, was made by the War Department and the report thereto made, which survey and report were on June 8, 1832, reported to Congress and form H. R. Document No. 265 of the first session of the Twenty-second Congress. This report showed the river could be made navigable to Franklin for a four and a half foot stage, all the year round, by a slackwater system, for 85-ton boats, which the report states was the type in use on the Ohio. By H. R. Document No. 343, second session of the Twenty-fifth Congress, it appears that another survey was made in 1836-1837, in pursuance of a resolution of Congress, and the same was reported to that body on March 23, 1838. * * * An examination of the War Department engineers shows that this survey was made in pursuance of a plan to connect the great river system of the West and Southwest with the New York State canals then building. In that
329 report the present navigation of the Allegheny was illustrated by the draft and capacity of the steamboat New Castle, then engaged in that river trade. * * * It will thus be seen that in this project, which had in view connecting the canal system of New

York State with the entire river systems of the West and Southwest, the Allegheny river was an important interstate link. * * * The report shows that the notes, maps, profiles and plans of this work were burned and no steps were taken toward slackwatering the stream until shortly after the Union Bridge was built; but this early work by Congress evidences an assumption by the National Government, at least to the extent of survey and examination, of jurisdiction over the Allegheny as a proper subject of interstate navogation improvement."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Sixth. "It will also be noted that the use of the Allegheny was included by the Government in its plans for the creation of a deep water harbor for Pittsburg. This is fully set forth in the report of Major Merrill of December 2, 1874, found in Chief of Engineers' report of 1875, volume, 2, page 687."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Seventh. "In view of the public interest and agitation over this proposed improvement the fact that the Allegheny was to be used as part of the harbor, the deterrent effect of the public notice by the engineer in charge, referred to hereafter in Judge Taft's opinion, that this bridge would obstruct navigation, becomes more significant."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Eighth. "The bridge company took no steps to alter, change or remove the bridge and in this shape the matter rested until July 2[6], 1904, three days before the expiration of the eighteen months'
330 time provided in the notice, when its counsel presented a petition to the then Secretary of War, Judge Taft, describing itself therein as the Union Bridge Company, 'owning and operating the Union Bridge, over the Allegheny River at Pittsburg, Pa., under and by virtue of the authority of the United States Government,' setting forth the making of the order to alter, that it would expire July 26, 1904, and praying such time be extended and a day fixed to present reasons for a rehearing.

"In pursuance of this petition, the Secretary of War, having temporarily suspended from time to time the order to alter the bridge, heard the arguments of counsel for the bridge company and thereafter, on July 21, 1905, delivered an opinion as follows:

'The Union Bridge is an unreasonable obstruction to commerce of the Allegheny river. If the bridge were not there, the winter refuge which the stretch of the Allegheny river up to the new bridge would offer for the fleet of boats, which usually are moored

in the Monongahela, would be a very great advantage for the navigation and commerce on the Ohio river and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in different sections of the country, have their ice-breaks at different times in the early spring. The mouth of one offers very desirable refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The Union bridge at the mouth of the Allegheny was erected at a time when the Secretary of War was not given specific control over navigable streams,
331 and was not authorized to inhibit the construction of bridges which are likely to obstruct navigation, but it appears that an army engineer, Colonel Merrill, in charge of the district, publicly announced that this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the Government. These are the facts that I find independently of any previous adjudication; but added to this, is the finding of my predecessor, Mr. Root, to exactly the same effect, upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before me on a petition for rehearing of Mr. Root's order. As an original question I should have ruled as Mr. Root ruled, and *a fortiori*, because the orders of this department are not to be lightly set aside, and are not to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake. The petition for rehearing is denied, and the order suspending the operation of Mr. Root's order is not revoked. The order will be put in force and executed by the proper officers, and the Union bridge — will be notified accordingly.'"

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Ninth. "From these recited facts it is clear that the bridge company had notice of the hearing, that it duly appeared, that on hearing and rehearing its rights were considered and that in pursuance of due action by the Secretary of War taken in the premises it has been determined that the bridge is an unreasonable obstruction to navigation."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

332 *Tenth.* "By this general act Congress itself enacted what should be done when an obstruction existed, and all the power conferred on the Secretary of War was to determine when the law should be enforced, and that this authority should not be abused, a party considering himself aggrieved is by the act given a direct appeal to the court of highest resort. That administrative duties in carrying out legislative powers may be delegated to departments has been held in many cases."

Exception noted and bill sealed.

Eleventh. "That the bridge is an obstruction to navigation is now settled, and is not now open to question; indeed, no question in that regard has even been raised in the whole proceedings, either on the hearing in pursuance of the statute or on the criminal proceedings in this court. It therefore having been legally determined that the bridge company maintains an obstruction to navigation and so fails to 'meet the requisitions of the law in regard to the obstruction of navigation,' it can claim no immunity or protection from the State of Pennsylvania, whose charter required that its bridge 'shall be constructed in such manner as meet the requisitions of the law in regard to the obstruction of navigation.'"

Exception noted and bill sealed.

Twelfth. "In this connection it should be noted that the financial loss sustained by this company is not in point of fact of the serious character that would at first sight appear. It has a wooden bridge some 30 years old. In the natural life of such a structure it would not have been long, were the Government taking no steps, before the company would have to replace it and expend a large sum of money in so doing. It will thus be seen that the actual loss to the company is not the cost of erecting a new and modern bridge,
333 but simply the profit arising from tolls during the life of its present structure."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Thirteenth. "Moreover, the case does not fall within the literal terms of the constitutional provision in that no 'private property (is) taken for public use.' * * * Indeed, the right of the bridge company to maintain a bridge and to collect tolls thereon is not denied, much less taken, and the effect of this proceeding is not to take or condemn its property, but is simply to compel the company to so use its property as not to interfere with the right of the public to an unobstructed use of the stream."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Fourteenth. "But waiving its charter conditions and the duty this bridge company owes to the State of Pennsylvania, under which alone it justifies the maintenance of this obstruction, we think the paramount right of Congress to require the alteration, without compensation, of any bridge obstructing navigable interstate waters is, under the decisions of the Supreme Court, clear."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Fifteenth. "Under these authorities we are of opinion that Congress was acting within its constitutional limits in enacting that

bridges, whenever they obstructed navigation, should be removed, and that without compensation made to the obstructor."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

Sixteenth. "Holding then, as we do, that this law is constitutional, the proceedings under it regular and the verdict of the jury warranted, we dismiss the motion in arrest of judgment and grant the motion of the Government to impose sentence."

Exception noted and bill sealed.

JOS. BUFFINGTON, [SEAL.]
Trial Judge.

334 [Endorsed:] No. 1, October Term, 1905. The United States of America *vs.* The Union Bridge Company. Defendant's Bill of Exceptions. Filed Sept. 27, 1906. Wm. T. Lindsey, Clerk.

335 The District Court of the United States for the Western District of Pennsylvania.

No. 1, October Term, 1905.

UNITED STATES OF AMERICA
vs.
UNION BRIDGE COMPANY.

I, William T. Lindsey, Clerk of the District Court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record and proceedings in the above entitled case so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court at Pittsburg this 27" day of September, A. D. 1906.

[SEAL.] WM. T. LINDSEY, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Joseph Buffington, District Judge of the United States for said district, do hereby certify that William T. Lindsey, above named, was at the time of making the above certificate and is now Clerk of the said Court, and that the said certificate made by him is in due form of law.

[Seal of the U. S. District Court, W. D. Pennsylvania.]

JOS. BUFFINGTON,
District Judge.

Pittsburg, Pa., September, 27", 1906.

Endorsed on cover: File No. 20,396. W. Pennsylvania D. C. U. S. Term No. 431. The Union Bridge Company, plaintiff in error, *vs.* The United States. Filed October 3d, 1906. File No. 20,396.

FILE COPY.

FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 431 OCTOBER TERM, 1906.

THE UNION BRIDGE COMPANY, Plaintiff in Error,

vs.

THE UNITED STATES.

In error to the District Court of the United States for the Western District of Pennsylvania.

JOHNS McCLEAVE,
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IN THE

Supreme Court of the United States.

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In error to the District Court of the United States for the Western District of Pennsylvania.

Statement of the Case.

(References are to the printed Record.)

By a charter dated August 17, 1873, the State of Pennsylvania created the Union Bridge Company a corporation with enumerated powers, among which was:
(Page 86):

> "That the said Union Bridge Company are hereby authorized to build, erect and construct a bridge *over the Allegheny River* at any practicable point on Duquesne

Way between Second Street and the Monongahela River and Allegheny Avenue or any other practicable point in the City of Allegheny."

"Provided, That the erection of said bridge shall not obstruct the navigation of said river, so as to endanger the passage of rafts, steamboats, or other crafts; and the piers shall not be placed as to interfere with towboats proceeding out with their tows made up, and shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation."

It authorized a capital stock of $350,000 with power to own and hold and sell all kinds of property, to issue mortgage bonds without limit, and gave it the power of eminent domain,

By Section 13 of the Act it was authorized to erect gates and demand and receive tolls from those passing over it.

The Allegheny River rises in Pennsylvania, flows into New York State and back to Pennsylvania, and at Pittsburgh it joins the Monongahela River and thus forms the Ohio. Pennsylvania, in 1798, had declared the Allegheny River a navigable stream as did New York in 1807, as to the Counties of Genesee and Alleghany in New York State.

The Union Bridge Company erected the present bridge in pursuance of the power so granted, at a cost of $310,000. It begins at a point on Duquesne Way immediately above the junction of the Monongahela and Allegheny Rivers and runs across the Allegheny River to a point on the bank of said River, and within the City of Allegheny now called Grant Avenue. Its length is about 1200 feet. Its height

above low water is 42 feet, and above what is now known as pool level, 36 feet. It is the highest of all the bridges which cross from Pittsburgh to Allegheny City.

It is a wooden, roof covered, bridge supported on two abutments and four piers, which latter were protected by riprapping. From 1874 down until this date it was and now is the only direct mode near the lower portion of Pittsburgh and Allegheny of access from Pittsburgh to Allegheny or Allegheny to Pittsburgh. The other nearest bridge was the Sixth Street Bridge running over the Allegheny River from Sixth Street in Pittsburgh to Federal Street in Allegheny City, which is distant ..... feet from the Union Bridge.

The Union Bridge was completed in the fall of 1874 (Long, p. 52) and ever since then the Union Bridge Company has maintained such bridge, and over it has and now does pass the large traffic to and from lower Pittsburgh and lower Allegheny City.

When this bridge was erected in 1873 and 1874 the Allegheny River for a distance of say one mile from its mouth was and now is the dividing line between the City of Pittsburgh and the City of Allegheny, the center of the river being the exact line, thus one-half of the river being on the Pittsburgh side and one-half on the Allegheny side. Approximately that river then was and now is 900 feet in width for a mile from its mouth, and until after the erection of the Davis Island dam in 1885, it was not as a fact navigable except for very light draft boats and except during freshets in the river. In 1873 and 1874, the population of the City of Pittsburgh was 121,215 people and the population of

the City of Allegheny was 58,596 people. Really, the two cities were one in effect, and their joint population in 1906 was as follows:

Pittsburgh	Allegheny	
321,616	129,896—	551,512

The Davis Island dam in the Ohio River is located 6 miles from the City of Pittsburgh, and was constructed in 1885. It raised the water at the junction of the Allegheny and Monongahela Rivers six feet above its normal depth and backed the water to the first dam of the Monongahela slackwater system and also to the now proposed slackwater of the Allegheny River—the legislation as to which was begun in 1875. Neither the Davis Island Dam nor the improvement of the Ohio River nor the proposed slackwater navigation of the Allegheny River was contemplated when the Union Bridge was incorporated. The first legislation as to the Davis Island Dam was in 1875, and the first legislation as to the slackwater system in the Allegheny River was in 1875.

Over the Allegheny River leading from Pittsburgh to Allegheny are the following bridges:

The Union Bridge, the Sixth Street Bridge, the Seventh Street Bridge, the Ninth Street Bridge, the bridge of the Pittsburgh, Ft. Wayne & Chicago Railway Company, the 16th Street Bridge and also the 33d Street Bridge and the Pittsburgh Junction Railroad Bridge.

The Union Bridge is the highest bridge of all these.

In August, 1902, a petition by certain individuals was sent to the Honorable Elihu Root, Secretary of War, complaining of the Union Bridge, asserting that it was an unreasonable obstruction to the navigation of the Monongahela, Allegheny and Ohio Rivers. This petition on September

23rd, 1902, was referred by H. F. Hodges, Major Corps of Engineers, to Captain W. L. Sibert, Corps of Engineers, for report, but it does not seem to have been seen or then acted on by the Secretary of War.

On October 13th, 1902, Captain Sibert, without giving the Union Bridge Co. an opportunity to be heard, made his examination and reported to the Chief Engineers (see pages 98 & 99), that in his opinion the Union Bridge had no legal existence and was an unreasonable obstruction to navigation, and that the interest of navigation demanded that the bridge should have a channel span of 70 feet above the pool made by the Davis Island dam, and a clear width of 394 feet between piers and he also advised that as portions of Allegheny City were submerged by floods, that the whole lower portion of the City should be raised.

On October 16th, 1902, Brigadier General Gillespie, Chief of Engineers, returned to the Secretary of War Captain Sibert's report with the following recommendation:

> "I recommend that the papers be returned to Captain Sibert with instructions to hold a public hearing after due notice to all interested parties, as required by the law and the orders of the War Department of September 16th, 1891."

On October 18th, 1902, the Secretary of War approved the recommendation of the Chief of Engineers.

Thus far all the steps taken were without any notice to the Union Bridge Company, nor had any opportunity been afforded it to be heard. The whole proceeding was secret.

October 23rd, 1902, the report was returned to Captain Sibert by A. Mackenzie, Colonel of the Corps of Engineers, with the following endorsement:

> "It is desired that Captain Sibert's further report shall show that the law and the orders of the War Department have been complied with. *The notice of hearing should specify the time in which specified alterations should be made.*"

On November 4th, 1902, Captain Sibert served a notice on the Union Bridge Company which is found on page 110, and is as follows:

"To The Union Bridge Co., Pittsburgh, Pa.:

Whereas, the Secretary of War has good reason to believe that *the bridge connecting the cities of Pittsburgh and Allegheny, at or near the mouth of the Allegheny River,* known as the Union Bridge, *is an unreasonable obstruction* to the free navigation of the Allegheny River and the Pittsburgh Harbor, on account of insufficient height and width of span, and of wide and high riprapping at the piers.

It is *proposed* to *require* the following changes to be made in said bridge by the 30th day of November, 1903, to wit: That the bridge be so altered as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second, or right-hand span to give a clear headroom over the Davis Island pool of not less than 70 feet, and the first span of not less than 70 feet at the pier and 62 feet at the abutment; Also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, *and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed.*

In order to give you an opportunity to be heard *as required* by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had *before me,* at Room 409, Post Office Building, on the east side of Smithfield Street, between Third and Fourth Avenues, in Pittsburgh, Pennsylvania, at 10 o'clock A. M., on the 14th day of November, 1902, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

WM. L. SIBERT,
Captain, Corps of Engineers."

This is the first notice to the Union Bridge Company. The so-called hearing was had and the Union Bridge Company was represented by its President and its Attorney, but *without knowledge on their part of the prior proceedings and Report of Captain Sibert.*

The next endorsement is by Captain Sibert, and is found on page 101. It is without date, and is as follows:

"U. S. ENGINEER OFFICE, PITTSBURGH, PA.

"Respectfully returned to the Chief of Engineers, U. S. A. A separate report is forwarded herewith."

That separate report will be found on pages 101-110 inclusive, and its examination is requested.

The Captain reported just *as he before had done,* that the Union Bridge was an unreasonable obstruction to the

navigation of the Allegheny River, and he then recommended as follows:
(Page 109):

"It is therefore recommended that the Union Bridge Co., of which James M. Bailey, c/o Phillips, Nimick & Co., Pittsburgh, Pa., is President, be given notice to make the following *changes* in its bridge connecting the cities of Pittsburgh and Allegheny, at or near the mouth of the Allegheny River, by June 30, 1904, to wit: That the bridge in question and known as the Union Bridge be *so altered* as to give *two navigable spans extending* riverward from the left abutment, of not less than 394 feet clear with each; the second span from the Pittsburgh shore to give a clear headroom over the Davis Island Pool of not less than 70 feet, the first span from the same shore to give a clear headroom of not less than 70 feet at the pier and 62 feet at abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, *and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed.*"

On January 20th, 1903 (page 111), Col. Mackenzie (page 91) directed Captain Sibert to serve upon the Union Bridge Company the following notice:
(Page 90) signed by the Secretary of War:

"To The Union Bridge Company, Pittsburg, Pennsylvania:

Whereas, The Secretary of War has good reason to believe that the bridge of the Union Bridge Company, a corporation existing under the laws of the State of Pennsylvania, across the Allegheny River, and connecting the cities of Pittsburgh and Allegheny, Pennsyl-

vania (said bridge being known as the Union Bridge), is an unreasonable obstruction to the free navigation of the said Allegheny River (which is one of the navigable waterways of the United States), on account of *insufficient height* and *width of span*, and of *wide and high riprapping at the piers;*

And whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation under it reasonably free, easy and unobstructed, to wit:

Alter said bridge so as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second span from the Pittsburgh shore to give a clear headroom over the Davis Island Pool of not less than 70 feet; and the first span from the same shore to give a clear headroom of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and *that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed.*

And whereas, Eighteen (18) months from the date of service of this notice is a reasonable time in which to alter the said bridge as described above;

Now, therefore, In obedience to, and by virtue of, section eighteen of an Act of the Congress of the United States entitled 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, I, Elihu Root, Secretary of War, *do hereby notify the said Union Bridge Company to alter* the said bridge as described above, and prescribe that said alterations shall be made and completed on or

before the expiration of eighteen months from the date of service hereof."

On July 23rd, 1904, the Union Bridge Company requested of the Honorable William H. Taft, then Secretary of War (p. 92), that the time fixed (July 26th, 1904) for completion of the work

"may be extended, and a day fixed when the Union Bridge Company may present reasons for a re-hearing in the matter of the change, alteration and elevation of the Union Bridge."

The Secretary of War wrote to the Chief of Engineers directing him to notify the Union Bridge Company that the order requiring the change of the bridge would be extended from July 26th, 1904, to August 10th, 1904 (p. 92).

The time was again extended by the Secretary of War to December 1st, 1904, and again extended to January 1st, 1905, and on June 21st, 1905, the then Secretary of War Taft after an argument refused a re-hearing, and by the following minute:

"War Department, Washington.

(Page 93):

In the Matter of the Union Bridge.

"The Union Bridge is an unreasonable obstruction to commerce of the Allegheny River. **If the bridge were** not there, the winter refuge which the stretch of the Allegheny River up to the next bridge would offer for the fleet of boats, which usually are moored in the Monongahela, would be a very great advantage for navigation and commerce on the Ohio River and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in different sections of the country, have their ice breaks at different times in the early spring. The mouth of the one offers very desirable

refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The Union Bridge at the mouth of the Allegheny was erected at a time when the Secretary of War was not given specific control over navigable streams, and was not authorized to inhibit the construction of bridges which were likely to obstruct navigation, but it appears that an army engineer, Colonel Merrill, in charge of the District, publicly announced that this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the Government. These are the facts that I find independently of any previous adjudication; but added to this, is the finding of my predecessor, Mr. Root, to exactly the same effect, upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before me on a petition for re-hearing of Mr. Root's order. As an original question I should have ruled as Mr. Root ruled, and *a fortiori,* because the orders of this Department are not to be lightly set aside, and are to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake, the petition for re-hearing is denied, and the order suspending the operation of Mr. Root's order is now revoked. The order will be put in full force and executed by the proper officers and the Union Bridge will be notified accordingly.

WM. H. TAFT,
Secretary of War.

June 21, 1905."

On August 8th, 1905, in the District Court of the United States for the Western District of Pennsylvania, the

United States Attorney moved for a rule to show cause against the Union Bridge Company as to why an information should not be filed against it.

(P. 81):

> "Charging it with maintaining and operating in the County of Allegheny and District aforesaid, during the month of July, A. D. 1905, a certain bridge over the Allegheny River, a navigable waterway of the United States, in violation of the provisions of Section 18 of the River and Harbor Act, approved March 3, 1899."

August 22, 1905, the Union Bridge Company filed objections to the issuing of the information, which are as follows:

(P. 80):

> "And now, 22d August, 1905, comes The Union Bridge Company and says that the information in manner and form suggested should not be allowed for the following reasons:
>
> 1. The Government has no authority for preferring information or indictment except by the terms of the Act of Congress of March 3rd, 1899.
>
> 2. The only offense under said Act is the failure by the Bridge Company to comply with the order of the Secretary of War requiring the re-construction or alteration of the bridge.
>
> 3. The bridge was erected under the authority of the State of Pennsylvania in the year 1874 at a cost of $310,000, many years before the Congress of the United States had assumed or exercised any jurisdiction over the Allegheny River.
>
> 4. The said Act, which is the only basis for the proposed information, is null and void in this:
>
> a. It does not provide any judicial inquiry as to the nature of the obstruction, and, as a matter of fact, no judicial inquiry has been had.

b. By its terms the United States do not provide compensation to the Bridge Company for the cost of the alteration required and as a matter of fact do not propose to provide for or make such compensation.

UNION BRIDGE CO.,
By JOS. FORD, *Secretary.*"

On September 27th, 1905, the rule to show cause was made absolute, and on September 27th, 1905, the information was filed (p. 74).

This information alleges that the Union Bridge Company was a corporation of the State of Pennsylvania, and that the bridge since July, 1905, has been maintained within the jurisdiction of the Court over the Allegheny river, at or near the mouth of the river over where it joins the Monongahela to form the Ohio, and that the bridge is an unreasonable obstruction to the free navigation of the Allegheny river:
(Page 75):

"for the reason that it is of insufficient height above said river, that the width of each of its spans, from pier to pier, supporting its superstructure is insufficient, and it has certain riprapping about each of said piers:"

Alleged that the clear height under said bridge at the stage of water known as pool stage Davis Island dam is only about 36 feet, and during the highest water stage the clear height of the bridge is only about 9 feet.

The bridge is composed of five spans, each having a width of about 203 feet, supported on four piers built in the river, surrounded by riprapping at side of said pier: and the information goes on to recite that the Secretary of War having good reason to believe that the bridge was an unrea-

sonabe obstruction to the free navigation of the river, gave notice to the Bridge Company so to alter the bridge, and before giving notice, "Gave the said Union Bridge Company reasonable opportunity to be heard touching the premises:" and a hearing was held by Capt. Sibert on November 14, 1902, at Pittsburgh, at which the Union Bridge Company by its counsel and attorney appeared: that Capt. Sibert reported to the Chief of Engineers said hearing: there was served upon the Union Bridge Company, January 26, 1903, a notice (hereinbefore recited at length) directing the Bridge Company to alter said bridge in manner as follows:
(Page 76):

> "Alter said bridge so as to give two navigable spans extending riverward from the left abutment of not less than 394 ft. clear width each; the second span from the Pittsburgh shore to give a clear headroom over the Davis Island pool of not less than 70 feet; and the first span from the same shore to give a clear headroom of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of the Davis Island pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed."

Eighteen months was given as the time within which to make these alterations, which time was further extended as hereinbefore stated.

The information was subsequently amended (page 71) and as amended concluded with the following:

> "Yet so it is, that at the end of the period fixed by the aforesaid notice to alter said Union Bridge, and at the date to which said time for the completion of said alteration had been extended by the Secretary of War,

to wit, the 1st day of January, A. D. 1905, the said alteration was not made; but to make the same the said Union Bridge Company hath failed, refused and neglected, to wit, for the period aforesaid, thereby wilfully failing and refusing to comply with the said lawful order of the Secretary of War.

And it is further alleged that the said Union Bridge Company has remained in default, as aforesaid, for and during the month of July, A. D. 1905, and has wilfully failed, refused and neglected to comply with the said lawful order of the Secretary of War, contained in the notice hereinbefore set forth, by failing, refusing and neglecting for and during said month, to make the changes specified in said notice, and has owned, controlled and maintained said Union Bridge over said Allegheny river during said month of July, A. D. 1905, the same being then and there obstructive to the free navigation of said river in the particulars hereinbefore set forth contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States."

The defendant pleaded *non cul et de hoc, etc.,* and issue being joined, a jury was sworn on October 18, 1905. The trial of the cause was adjourned from time to time, but was proceeded with in January, 1906, and on that trial evidence was offered of the facts hereinbefore stated. Among other things it was proven that the alterations ordered were not really alterations, but the order of the Secretary would require the removal of the old bridge and the building of a new bridge of a different order and style at a cost of $459,325 to the Bridge Company and this exclusive of the land damages which would be incurred (pages 52-53).

The Government offered no evidence whatever that the Union Bridge was in any way an obstruction to navigation,

but relied upon the order of the Secretary of War solely and only.

The defendant, the Bridge Company, asked the Court to charge the jury in manner as follows:

1. "That in the absence of any legislation by the Congress of the United States assuming jurisdiction over the Allegheny River, the power of the State of Pennsylvania to authorize the construction of any bridges that it might see fit, including the Union Bridge over the Allegheny River, was plenary; and such erection having been made under and by the State authority, the bridge is a lawful structure and the private property of the Bridge Company.

Answer: Refused."

2. "The attempt in the present proceedings upon the part of the United States to compel a reconstruction or removal of the Union Bridge erected under the authority of the State of Pennsylvania, is only referable to the 18th Section of the River and Harbor Bill of the Congress of the United States, approved March 3, 1899.

Answer: Refused."

3. "The said 18th Section of the River and Harbor Bill of the Congress of the United States, approved March 3rd, 1899, is null and void for the following reasons:

(a) The said Act attempts to take and destroy the private property of the Union Bridge Company, without due process of law.

(b) The said Act undertakes to authorize the taking of private property for public use without just compensation.

(c) In and by the terms of the said Act, it is undertaken by the Congress of the United States to unlawfully delegate to the Secretary of War of the United

States and to the Chief of the Engineer Corps of the United States Army, both legislative and judicial powers, in contravention of the Constitution of the United States.

Answer: Refused."

4. "The Union Bridge having been erected across the Allegheny River prior to the enactment of any legislation of the Congress of the United States assuming jurisdiction over the said river, and having, as erected, been maintained and used by the said Bridge Company and the public at large, with the consent and acquiescence of the State of Pennsylvania, and without interference or complaint of any of the authorities of the United States until the beginning of these proceedings, the said bridge is a lawful structure and cannot be taken by the United States, either by way of requiring a reconstruction of the same or removal of the said bridge, without making just compensation to the Union Bridge Company therefor.

Answer: Refused."

5. "That said Act of Congress makes it the duty of the Secretary of War, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge, to wit, the bridge complained against, so to alter the same as to render navigation through or under it reasonably free and unobstructed, and, in giving such notice, he shall specify the changes recommended by the Chief of Engineers that are required to be made and shall prescribe in each case a reasonable time in which to make them: Under this, the Secretary of War was required affirmatively by the act to give to the Union Bridge Company, owning the bridge in controversy in this case, opportunity to be heard by him, the said Secretary of War, before he was authorized or lawfully empowered to give the notice to the said company to so

alter the bridge in requirement with his order, and it appearing affirmatively in the case that the said Elihu Root, the Secretary of War, in making the order set forth in the information, never at any time gave the Union Bridge Company reasonable opportunity to be heard before him, or any hearing whatsoever, the order set forth in the information, given and signed by the said Elihu Root, then Secretary of War, is not a lawful order, and is null and void and not authorized by the said act.

Answer: Refused."

6. "There is no evidence in the case that the Union Bridge is or at any time was an unreasonable obstruction to the navigation of the Allegheny River.

Answer: Refused."

"Counsel for the United States Government requested the following conclusions of law:

FIRST. By Section 18 of the Act of March 3, 1899 (30 St., 1153), Congress placed upon the Secretary of War the duty of determining whether or not bridges over navigable waterways of the United States were obstructions to the navigation of such waterways. In case he complied with the requirements of the law in regard to a hearing, and fixed a reasonable time for the completion of the prescribed alterations, his notice to alter the Union Bridge, set forth in the information filed at above number and term, was a lawful notice, and the failure to alter said bridge in accordance with said order or to remove the said structure, if continued during the month of July, A. D. 1905, constituted the misdemeanor charged in the information; and though the defendant originally built said Union Bridge under color of authority of an Act of Assembly of the State of Pennsylvania, and even though the requirements of that Act of Assembly were strictly observed by said Union

Bridge in constructing said bridge, such Act of Assembly would not constitute a valid defense to the information.

Answer: Affirmed."

2. "The cost of making the alterations prescribed by the Secretary of War in his notice to the Union Bridge Company, set forth in the information and offered in evidence, or the cost of the removal of the Union Bridge, is not a valid defense to the charge of failing to obey such order, in the absence of testimony showing the removal of the bridge, or the inability of the Union Bridge Company to remove it within the period fixed by the said notice.

Answer: Affirmed."

3. "Section 18 of the Act of March 3, 1899, directs the Secretary of War to give the parties in interest, to wit, the bridge owners, a reasonable opportunity to be heard, prior to issuing a final notice to said bridge owners, to make the alterations deemed necessary by him in order to render the bridge under consideration not an obstruction to the free navigation of the river spanned by it. Such hearing need not be held by the Secretary of War in person; and it is sufficient under the provisions of the Act if the Secretary of War had given said owners an opportunity to be heard relative to the proposed alterations, before one or more of his agents or subordinates, and the testimony or statements made at said hearing have been transmitted to and considered by said Secretary of War.

Answer: Affirmed."

Thereupon, His Honor Judge Buffington presiding (p. 58), charged the jury as follows:

"* * * Gentlemen of the Jury, it will be your duty to return a verdict finding the defendant in this case guilty in manner and form as it stands indicted."

To the Answer of the Judge, to the various points presented by the Government and the defendant, as well as to the charge of the court, His Honor, at the instance of the defendant, signed Bills of Exception.

Thereupon the jury found the defendants guilty.

On January 15th, 1906, the defendant moved the court to order and direct that judgment upon the verdict be arrested, and gave therefor the following reasons: (P. 35):

"And now, to wit, this 15th day of January, in the year 1906, comes the defendant in the above entitled cause by its counsel and moves the court to order and direct that judgment upon the verdict herein rendered be arrested for the following reasons:

FIRST: The information herein filed, as conceded by the Government, is based upon and authorized only by the 18th Section of the River and Harbor Act of the Congress of the United States, approved March 3rd, 1899; and said act of the Congress of the United States is unconstitutional, null and void and no authority for this prosecution for the following reasons:

(a) In that it undertakes to take or destroy private property of the Union Bridge Company without due process of law.

(b) In that it undertakes to take the private property of the Union Bridge Company for public use without making just compensation therefor.

(c) In that the said act attempts to unlawfully delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army legislative powers belonging exclusively to Congress, in contravention of the Constitution of the United States.

(d) In that the said act undertakes unlawfully to delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army judicial powers in respect to the bridge of the defendant company exclusively vested by the Constitution in the judiciary of the United States.

SECOND. That there is no sufficient evidence in the cause to support a conviction of the defendant of the charge made in the information."

On February 9th, 1906, the court filed an elaborate opinion overruling the motion to arrest judgment, and granting the motion of the Government to impose the sentence.

On February 20th, 1906, the court sentenced the defendant in manner as follows:
(P. 84):

"Then sentence of the court is, that you, the Union Bridge Company, pay a fine to the United States of Five Thousand Dollars; that you pay the costs of this prosecution, and stand committed until this sentence be complied with."

On April 12th, 1906, the defendant petitioned the court for a writ of error from the Supreme Court of the United States, and the same was directed to be issued, and thus the case is here.

Assignments of Error.

FIRST. The court erred in its answer to the first point presented on behalf of the defendant, which point and answer are as follows:

> "FIRST: That in the absence of any legislation by the Congress of the United States, assuming jurisdiction over the Allegheny River, the power of the State of Pennsylvania to authorize the construction of any bridges that it might see fit, including the Union Bridge over the Allegheny River, was plenary, and if such erection was made under and by the state authority, the bridge is a lawful structure and the private property of the Bridge Company." Answer: "Refused."

SECOND. The court erred in its answer to the second point presented upon behalf of the defendant, which point and answer are as follows:

> "SECOND: The attempt in the present proceedings, upon the part of the United States, to compel the reconstruction or removal of the Union Bridge, erected under the authority of the State of Pennsylvania, is only referable to the 18th Section of the River and Harbor Bill of the Congress of the United States, approved March 3rd, 1899." Answer: "Refused."

THIRD. The court erred in its answer to the third point presented upon behalf of the defendant, which point and answer are as follows:

> "THIRD: The said 18th Section of the River and Harbor Bill of the Congress of the United States, approved March 3rd, 1899, is null and void for the following reasons:
>
> > "(a) The said act attempts to take and destroy the private property of the Union Bridge Company without due process of law.

"(b) The said act undertakes to authorize the taking of private property for public use without just compensation.

"(c) In and by the terms of the said act it is undertaken by the Congress of the United States to unlawfully delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army both legislative and judicial powers, in contravention of the Constitution of the United States." Answer: "Refused."

FOURTH. The court erred in its answer to the fourth point presented upon behalf of the defendant, which point and answer are as follows:

"FOURTH: The Union Bridge having been erected across the Allegheny River prior to the enactment of any legislation of the Congress of the United States assuming jurisdiction over the said river, and having, as erected, been maintained and used by the said Bridge Company and the public at large with the consent and acquiescence of the State of Pennsylvania and without interference or complaint of any of the authorities of the United States until the beginning of these proceedings, the said bridge is a lawful structure and cannot be taken by the United States, either by way of requiring a reconstruction of the same or removal of the said bridge, without making just compensation to the Union Bridge Company therefor." Answer: "Refused."

FIFTH. The court erred in its answer to the fifth point presented upon behalf of the defendant, which point and answer are as follows:

"FIFTH: The said Act of Congress makes it the duty of the said Secretary of War, first giving the parties reasonable opportunity to be heard, to give no-

tice to the persons or corporations owning or controlling such bridge, to wit, the bridge complained against, so to alter the same as to render navigation through or under it reasonably free and unobstructed, and in giving such notice he shall specify the changes to be made and shall prescribe in each case a reasonable time in which to make them. Under this, the Secretary of War was required affirmatively by the act to give to the Union Bridge Company, owning the bridge in controversy in this case, an opportunity to be heard by him, the said Secretary of War, before he was authorized or lawfully empowered to give the notice to the said Company to so alter the bridge in requirement with his order, and it appearing affirmatively in the case that the said Elihu Root, the Secretary of War, in making the order set forth in the information, never at any time gave the Union Bridge Company reasonable opportunity to be heard before him, or any hearing whatsoever. The order set forth in the information, given and signed by the said Elihu Root, then the Secretary of War, is not a lawful order and is null and void and not authorized by the said act." Answer: "Refused."

SIXTH. The court erred in its answer to the first point put upon the part of the United States, which point and answer are as follows:

"FIRST: By Section 18 of the Act of March 3, 1899 (30 St., 1153), Congress placed upon the Secretary of War the duty of determining whether or not bridges over navigable waterways of the United States were obstructive to the navigation of such waterways. In case he complies with the requirements of the law in regard to a hearing, and fixes a reasonable time for the completion of the prescribed alterations, his notice to alter the Union Bridge, set forth in the information, was a lawful notice, and the failure to alter said bridge

in accordance with said order, or to remove the said structure, if continued during the month of July, A. D. 1905, constituted the misdemeanor charged in the information; and though the defendant originally built said Union Bridge under color of authority of an Act of Assembly of the State of Pennsylvania, and even though the requirements of that Act of Assembly were strictly observed by said Union Bridge Company in constructing said Bridge, such Act of Assembly would not constitute a valid defense to the Information." Answer: "Affirmed."

SEVENTH. The court erred in its answer to the second point put upon behalf of the United States:

"2. The cost of making the alterations prescribed by the Secretary of War in his notice to the Union Bridge Company, set forth in the information and offered in evidence, or the cost of the removal of the Union Bridge, is not a defense to the charge of failing to obey such order, in the absence of testimony showing the removal of the bridge, or the inability of the Union Bridge Company to remove it within the period fixed by the said notice." Answer: "Affirmed."

EIGHTH. The court erred in its answer to the third point put upon behalf of the United States:

"3. Section 18 of the Act of March 3, 1899, directs the Secretary of War to give the parties in interest, to wit, the bridge owners, a reasonable opportunity to be heard, prior to issuing a final notice to said bridge owners, to make the alterations deemed necessary by him in order to render the bridge under consideration not an obstruction to the free navigation of the river spanned by it. Such hearing need not be held by the Secretary of War in person; and it is sufficient under the provi-

sions of the Act if the Secretary of War has given said owners an opportunity to be heard relative to the proposed alterations, before one or more of his agents or subordinates, and the testimony or statements made at said hearing have been transmitted and considered by said Secretary of War." Answer: "Affirmed."

Ninth. The court below erred in that portion of its charge to the jury, as follows:

"The Union Bridge Company is a corporation of the State of Pennsylvania. It built this bridge over the Allegheny River in pursuance of the powers conferred upon it by its charter granted by the state. The Secretary of War, in pursuance of the powers vested in him by an Act of Congress, has notified the Bridge Company, after hearing the parties, that this bridge is an obstruction to navigation and has ordered to have it altered so as to avoid its being an obstruction to navigation. On the part of the Government it is contended that this is a lawful order of the Secretary of War, and for present purposes we instruct you that it is."

Tenth. The court below erred in that portion of its charge to the jury which reads as follows:

"This is a proceeding by the United States against the Union Bridge Company in the nature of a criminal information, for failure to alter a bridge which is an alleged obstruction to navigation. On the trial thereof, no issues of fact were raised."

Eleventh. The court below erred in that portion of its charge to the jury which reads as follows:

"The Allegheny River rises in Pennsylvania, flows North into New York State and thence back into Pennsylvania. The latter state, by Act of March 21st, 1798, enacted the Allegheny, from the New York State line

to its mouth, a navigable stream; and the State of New York, by Act of March 31st, 1807, did likewise in its Counties of Genesee and Alleghany."

TWELFTH. The court below erred in that portion of its charge to the jury which reads as follows:

"The Allegheny is the principal branch of the Ohio, its volume being six times greater than that of the Monongahela. It is included in the general plan for the improvement by the National Government of local interstate waterways and the harbor of Pittsburgh."

THIRTEENTH. The court below erred in that portion of its charge to the jury which reads as follows:

"The Union Bridge is a pier-supported, wooden structure; it crosses from Pittsburgh to Allegheny City, and is the first bridge on the Allegheny. It was built in 1874-1875 by the Union Bridge Company, a corporation chartered by the State of Pennsylvania, March 13, 1873, and was opened for travel July, 1875."

FOURTEENTH. The court below erred in that portion of its charge to the jury which reads as follows:

"By the Act of April 30th, 1824, Congress inaugurated the system under which the appropriations were annually made providing for surveys and the reports thereof to Congress during the period later referred to herein, viz., from 1828 to 1838. * * * By virtue of this Act Congress, by resolution of December 9, 1828, authorized the examination of 'the Allegheny river from the City of Pittsburgh to the mouth of French Creek, at Franklin, with a view to slackwater navigation.' Such survey, a distance of one hundred and twenty-one miles, was made by the War Department and the report thereto made, which survey and report were on June 8, 1832, reported to Congress and form H. R. Document No.

265 of the first session of the Twenty-second Congress. This report showed the river could be made navigable to Franklin for a four and a half foot stage, all the year round, by a slackwater system, for 85-ton boats, which the report states was the type in use on the Ohio. By H. R. Document No. 343, second session of the Twenty-fifth Congress, it appears that another survey was made in 1836-1837, in pursuance of a resolution of Congress, and the same was reported to that body on March 23, 1838. * * * An examination of the War Department engineers shows that this survey was made in pursuance of a plan to connect the great river system of the West and Southwest with the New York State canals then building. In that report the present navigation of the Allegheny was illustrated by the draft and capacity of the steamboat New Castle, then engaged in that river trade. * * * It will thus be seen that in this project, which had in view connecting the canal system of New York State with the entire river systems of the West and Southwest, the Allegheny river was an important interstate link. * * * The report shows that the notes, maps, profiles and plans of this work were burned and no steps were taken toward slackwatering the stream until shortly after the Union Bridge was built; but this early work by Congress evidences an assumption by the National Government, at least to the extent of survey and examination, of jurisdiction over the Allegheny as a proper subject of interstate navigation improvement."

FIFTEENTH. The court below erred in that portion of its charge which reads as follows:

"It will also be noted that the use of the Allegheny was included by the Government in its plans for the creation of a deep water harbor for Pittsburgh. This is

fully set forth in the report of Major Merrill of December 2, 1874, found in Chief of Engineers' report of 1875, Volume 2, page 687."

SIXTEENTH. The court below erred in that portion of its charge to the jury which reads as follows:

"In view of the public interest and agitation over this proposed improvement the fact that the Allegheny was to be used as part of the harbor, the deterrent effect of the public notice by the engineer in charge, referred to hereafter in Judge Taft's opinion, that this bridge would obstruct navigation, becomes more significant."

SEVENTEENTH. The court below erred in that portion of its charge to the jury which reads as follows:

"The bridge company took no steps to alter, change or remove the bridge and in this shape the matter rested until July 23, 1904, three days before the expiration of the eighteen months' time provided in the notice, when its counsel presented a petition to the then Secretary of War, Judge Taft, describing itself therein as the Union Bridge Company, 'owning and operating the Union Bridge, over the Allegheny River at Pittsburgh, Pa., under and by virtue of the authority of the United States Government,' setting forth the making of the order to alter, that it would expire July 26, 1904, and praying such time be extended and a day fixed to present reasons for a re-hearing.

"In pursuance of this petition, the Secretary of War, having temporarily suspended from time to time the order to alter the bridge, heard the arguments of counsel for the bridge company and thereafter, on July 21, 1905, delivered an opinion as follows:

" 'The Union Bridge is an unreasonable obstruction to commerce of the Allegheny river. If the bridge were not there, the winter refuge which the stretch of the

Allegheny river up to the new bridge would offer for the fleet of boats, which usually are moored in the Monongahela, would be a very great advantage for the navigation and commerce on the Ohio river and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in different sections of the country, have their ice-breaks at different times in the early spring. The mouth of one offers very desirable refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The Union bridge at the mouth of the Allegheny was erected at a time when the Secretary of War was not given specific control over navigable streams, and was not authorized to inhibit the construction of bridges which are likely to obstruct navigation, but it appears that an army engineer, Colonel Merrill, in charge of the district, publicly announced that this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the Government. These are the facts that I find independently of any previous adjudication; but added to this, is the finding of my predecessor, Mr. Root, to exactly the same effect, upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before me on a petition for rehearing of Mr. Root's order. As an original question I should have ruled as Mr. Root rules, and *a fortiori*, because the orders of this department are not to be lightly set aside, and are to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake. The petition for rehearing is denied, and the order suspending the operation of Mr. Root's order is not revoked. The order will be put in force and executed by the proper offi-

cers, and the Union Bridge will be notified accordingly.' "

EIGHTEENTH. The court below erred in that portion of its charge to the jury which reads as follows:

"From these recited facts it is clear that the bridge company had notice of the hearing, that it duly appeared, that on hearing and rehearing its rights were considered and that in pursuance of due action by the Secretary of War taken in the premises it has been determined that the bridge is an unreasonable obstruction to navigation."

NINETEENTH. The court below erred in that portion of its charge to the jury which reads as follows:

"By this general act Congress itself enacted what should be done when an obstruction existed, and all the power conferred on the Secretary of War was to determine when the law should be enforced, and that this authority should not be abused, a party considering himself aggrieved is by the act given a direct appeal to the court of highest resort. That administrative duties in carrying out legislative powers may be delegated to departments has been held in many cases."

TWENTIETH. The court below erred in that portion of its charge to the jury which reads as follows:

"That the bridge is an obstruction to navigation is now settled, and is not now open to question; indeed, no question in that regard has ever been raised in the whole proceeding, either on the hearing in pursuance of the statute or on the criminal proceedings in this court. It therefore having been legally determined that the bridge company maintains an obstruction to navigation and so fails to 'meet the requisitions of the law in

regard to the obstructions of navigation,' it can claim no immunity or protection from the State of Pennsylvania, whose charter required that its bridge 'shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation.'"

TWENTY-FIRST. The court below erred in that portion of its charge to the jury which reads as follows:

"In this connection it should be noted that the financial loss sustained by this company is not in point of fact of the serious character that would at first sight appear. It has a wooden bridge some 30 years old. In the natural life of such a structure it would not have been long, were the Government taking no steps, before the company would have to replace it and expend a large sum of money in so doing. It will thus be seen that the actual loss to the company is not the cost of erecting a new and modern bridge, but simply the profit arising from tolls during the life of its present structure."

TWENTY-SECOND. The court below erred in that portion of its charge to the jury which reads as follows:

"Moreover, the case does not fall within the literal terms of the constitutional provision in that no private 'property (is) taken for public use.' * * * Indeed, the right of the bridge company to maintain a bridge and to collect tolls thereon is not denied, much less taken, and the effect of this proceeding is not to take or condemn its property, but is simply to compel the company to so use its property as not to interfere with the right of the public to an unobstructed use of the stream."

TWENTY-THIRD. The court below erred in that portion of its charge to the jury which reads as follows:

"But waiving its charter conditions and the duty this bridge company owes to the State of Pennsylvania,

under which alone it justifies the maintenance of this obstruction, we think the paramount right of Congress to require the alteration, without compensation, of any bridge obstructing navigable interstate waters is, under the decisions of the Supreme Court, clear."

TWENTY-FOURTH. The court below erred in that portion of its charge to the jury which reads as follows:

"Under these authorities we are of opinion that Congress was acting within its constitutional limits in enacting that bridges, whenever they obstructed navigation, should be removed, and that without compensation made to the obstructor."

TWENTY-FIFTH. The court below erred in that portion of its charge to the jury which reads as follows:

"Holding then, as we do, that this law is constitutional, the proceedings under it regular and the verdict of the jury warranted, we dismiss the motion in arrest of judgment and grant the motion of the Government to impose sentence."

Argument.

The formation, though voluminous, is based solely on the neglect of the Bridge Company to obey the order of the Secretary of War, dated January 20, 1905. It contained many recitals as to the bridge being an obstruction to navigation, but no evidence whatever was offered to prove these allegations. There was absolutely nothing offered on the trial to prove that the bridge now was or ever had been an actual obstruction to navigation, or that it was erected contrary to the provisions of its charter. The sole and only question considered in the court below was:

Has the Bridge Company complied with the order of the Secretary of War, dated January 20, 1906?

Whether the bridge had or had not been erected in accordance with the charter of the State of Pennsylvania was not a question upon which any evidence whatever was given in the court below. There was absolutely no evidence given on it by the Government.

The Government on the trial in the court below simply proved the following:

That to Capt. Sibert had been committed the question as to what, if any, changes in the bridge structure should be made in order to render navigation under the bridge free and unobstructed. There was absolutely no evidence in the case, even upon that point offered by the Government. The Government's entire case was briefly, that the order of the Secretary of War of January 20, 1906, had been served upon the Bridge Company, and the Bridge Company had neglected to comply with that order and that, therefore, by reason of this neglect, and by reason of this neglect only, the bridge company was guilty under the information as made. The Court affirming one point of the Government, charged the Jury that

"Though the defendant originally built said Union Bridge under color of authority of an Act of Assembly of the State of Pennsylvania, and even though the requirements of that Act of Assembly were strictly observed by said Union Bridge (Co.) in constructing said bridge, such Act of Assembly would not constitute a valid defense to the Information." (Page 114.)

This conclusively eliminated from the case the allegation in Captain Sibert's report that the Union Bridge had not been constructed in accordance with its charter. Whether it had or had not the court charged was aside from and entirely foreign to the real question in the case, which was:

Not whether the bridge *as a fact* was or was not an obstruction to navigation, but whether the Union Bridge Company had obeyed the order of the Secretary of War of January 20, 1906, requiring it to alter the bridge.

The Judge below in his opinion (page 116) said

"on the trial thereof no issues of fact were raised:"

FIRST: THE UNION BRIDGE LOCATED IN THE STATE OF PENNSYLVANIA AND SPANNING THE ALLEGHENY RIVER FROM PITTSBURGH TO ALLEGHENY CITY, ERECTED IN 1874, PRIOR TO ANY LEGISLATION BY CONGRESS, AND UNDER AN ACT OF PENNSYLVANIA, APPROVED AUGUST 17, 1873 (p. 86), AND EVER SINCE MAINTAINED AND USED AS A PUBLIC TRAFFIC BRIDGE, COLLECTING TOLLS FOR USE OF THE SAME, WAS WHEN THE PRESENT PROCEEDINGS WERE INSTITUTED BY THE SECRETARY OF WAR AND WHEN HE MADE HIS ORDER OF JANUARY 20, 1906, FOR THE ALTERATION OF SAID BRIDGE, A LAWFUL STRUCTURE AND THE PRIVATE PROPERTY OF THE UNION BRIDGE COMPANY.

Prior to the organization of the United States as a distinct sovereignty Pennsylvania had exclusive jurisdiction over

the streams that ran inside of its territorial limits, and this included the Allegheny, the Monongahela and the Ohio rivers. A portion of each of these rivers did traverse the territory of other sovereignties, but it is still true that the portion within the state of Pennsylvania was under the absolute control of that state.

Pennsylvania could then authorize bridges over any of these rivers to any height and of any kind of construction that it saw proper.

In *Peoples vs. Rensalear Railroad Company,* 15 Wendell (pp. 113-131), Chief Justice Savage said:

> "I think I may safely say that a power exists somewhere to erect bridges over waters which are navigable, if the wants of society require them, provided such bridges do not essentially injure the navigation of the waters which they cross. Such power certainly did exist in the state legislature before the delegation of power to the Federal Government by the Federal constitution. It is not pretended that such a power has been delegated to the general government, or is conveyed under the power to regulate commerce and navigation; it remains then in the state legislation, or it exists nowhere. It does exist, because it has not been surrendered any further than such surrender may be qualifiedly implied; that is, the power to erect bridges over navigable streams must be considered so far surrendered as may be necessary for a free navigation upon those streams."

In *Wilson vs. Blackbird Marsh Co.,* 2nd Peter 250, speaking of the erection, under State authority, of bridges and dams across navigable waters, the Court said * * * p. 432:

> "* * * In cases where these erections or obstructions to the navigation are constructed under a law of the

state, or sanctioned by legislative authority, they are neither a public nuisance subject to abatement, nor is the individual who may have sustained special damage from their interference with the public use entitled to any remedy for his loss. So far as the public use of the stream is concerned, the legislature having the power to control and regulate it, the statute authorizing the structure, though it may be a *real impediment* to the navigation, *makes it lawful.*"

In *Willamette Iron Bridge Co. vs. Hatch,* 125 U. S. (p. 2), the Court said:

"But it is well settled that the legislatures of such states do have the same power to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits, as have the original states, in reference to which no such clause exists. * * * Until Congress intervenes in such cases and exercises its authority, the power of the state is plenary. When the state provides for the form and character of the structure, its directions will control, except as against the action of Congress, whether the bridge be with or without draws, and irrespective of its effect upon navigation."

In the *Lake Shore Co. vs. Ohio,* 165 U. S., 365, this Court said:

"That full power resides in the states as to the erection of bridges and other works in navigable streams, wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary; is conclusively determined."

In *Gilman vs. Philadelphia,* 3 Wallace, 713, Pennsylvania had authorized the City of Philadelphia to construct a bridge across the Schuylkill river which seriously interfered

with the navigation of the stream, and the Supreme Court held as follows:

> "The national government possesses no powers but such as has been delegated to it. The states have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the Federal constitution. It has not been taken from the states. It must reside somewhere. They had it before the constitution was adopted and they have it still. 'When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the constitution to the General Government.'"

In *Pollard, Lessee, vs. Hagan,* this Court said:

> "The right of eminent domain over the shores and the soil under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it * * * bridges are of the same nature with ferries and are undoubtedly within the category thus laid down. * * * It must not be forgotten that bridges which are connecting parts of turnpikes, streets and railroads, *are means of commercial transportation, as well as navigable waters,* and that the *commerce which passes over a bridge* may be much greater than would ever be transported on the water it obstructs. *It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other.* The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress."

The Monongahela Navigation Co. vs. U. S., 148 U. S. (p. 325), this Court said, speaking of the jurisdiction of the state:

> "If, in the opinion of the state, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state—and on that point the state must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. * * * How the highways of a state, whether on land or by water, shall be best improved for the public good, is a matter for State determination, subject always to the right of Congress to INTERPOSE in the cases mentioned."

Congress had not legislated in reference to the Allegheny river until 1875, after the Act of Pennsylvania authorizing the erection of the Union Bridge Company, and after the bridge had been constructed at an expense of $310,000 and after said bridge was open to travel.

The government indeed does not allege that Congress had so legislated as to evince its determination to take charge of the Allegheny river. The only legislation which his Honor, Judge Buffington, could find as to the Allegheny river by Congress prior to 1875 was one passed in 1828 by Congress authorizing the examination of:

> The Allegheny River from the City of Pittsburgh to the mouth of French Creek at Franklin with a view to slack water navigation. There was such a survey reported to Congress in 1832, but nothing whatever was ever done in pursuance thereof. There was also in 1838 an interstate survey by Congress beginning in Pennsylvania and extending into New York, but there was no assumption whatever by the National government of jurisdiction *over the* Allegheny river.

That such acts of Congress were not the assumption of jurisdiction over the Allegheny river so as to exclude the state from the exercise of its ordinary municipal power in the construction of bridges hardly needs demonstration. The inaction of Congress after such surveys were made, rather goes to prove that it declined to interfere and assume jurisdiction over the Allegheny river.

As to what legislation of Congress is necessary to evince a determination of Congress to exercise its jurisdiction over any given river,

Gilman vs. Philadelphia, 3 Wallace, 727.
See *The Wheeling Bridge Case,* 13 Howard, 630.
Lake Shore Co. vs. Ohio, 165 U. S., 365.

As Congress had not legislated and assumed jurisdiction of the Allegheny River prior to 1875, the absence of such legislation was really affirmative action by Congress that the State might freely legislate on the subject of the erection of bridges across the streams within its borders.

In the language of Mr. Justice Field its power was "plenary."

This question was considered at length in the *County of Mobile vs. Kimball,* 102 U. S., 697, and the following conclusions were arrived at

(a) General and exclusive jurisdiction of the Interstate streams which are part of commerce was given to Congress by the Commerce clause of the Constitution.

(b) In the absence of legislation by Congress exercising the power thus given in the Commerce clause, the inference to be drawn from the absence of legislation depends upon the peculiar circumstances of the case.

(1) If the proposed regulation by the State is national in its character and requires uniformity

of regulation throughout the country, then the non-action of Congress

(p. 697):

> "Is a declaration of its purpose that the commerce in that community or by that means of transportation *shall be free.*"

(2) If on the other hand,

(p. 698):

> "From the nature of the subject or the sphere of its operations the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, *but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority.*"

On pages 699-702 the Court considers the different decisions on this question and affirms the conclusions hereinbefore given, and especially that one that if the improvement is of a local nature like a bridge, the inaction of Congress is to be:

(p. 702):

> "deemed a declaration that for the time being and until it sees fit to act, they may be regulated by State authority."

In *Hure vs. Glover*, 119 U. S. 543, this Court said:

> "How the highways of a State, whether on land or water, shall be best improved for the public good is a matter for State determination, subject always to the right of Congress to interpose. * * *"

Cited and approved in *Mon. Nav. Co. vs. U. S.*, 148 U. S., 332.

The charter of the Union Bridge Company was granted in 1873, and the Bridge was erected in 1874, and it thereby became under its charter the private property of the Union Bridge Company.

It then was a lawful structure—the lawful property of the Union Bridge Company.

As Justice Bradley said in the *Bridge Co. vs. United States*, 105 U. S., p. 507:

> "* * * It is equally true * * * where a bridge is constructed across it in accordance with the laws of the State and with the consent of Congress, such structures are lawful and are private property entitled to the Constitutional protection. That which is lawful is not a nuisance, and cannot be prostrated or removed as such without compensation."

SECOND: THE GOVERNMENT OFFERED NO EVIDENCE WHATEVER TO SHOW THAT THE UNION BRIDGE WAS NOT CONSTRUCTED IN ACCORDANCE WITH ITS CHARTER, OR THAT THE UNION BRIDGE AS CONSTRUCTED AS A FACT, WAS AN UNREASONABLE OBSTRUCTION TO NAVIGATION, AND THE FACT THAT THE STATE OF PENNSYLVANIA, WHICH GRANTED THE CHARTER, HAD FOR OVER THIRTY YEARS ACQUIESCED IN THE CONSTRUCTION OF THE BRIDGE AND IN THE BRIDGE AS CONSTRUCTED, AND HAD MADE NO OBJECTION WHATEVER TO IT, IS CONCLUSIVE IN THE FEDERAL COURT THAT THE BRIDGE WAS LAWFULLY CONSTRUCTED.

Section Seven of the *Act of August* 17, 1873, of the State of Pennsylvania (p. 86), enacted:

> "That the said Union Bridge Company are hereby authorized to build, erect and construct a bridge over the Allegheny River at any practicable point on Duquesne Way between Second Street and the Monongahela River and Allegheny Avenue, or any other practical point in the City of Allegheny; Provided, That the erection of said bridge shall not obstruct the navigation of said river so as to endanger the passage of rafts, steamboats or other water crafts; and the piers shall not be so placed as to interfere with towboats proceeding out with their tows made up, and shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation."

Pennsylvania left the Union Bridge Company the power to select the location of the bridge within certain limits, and provided that the bridge should not

> "Obstruct the navigation of said river so as to endanger the passage of rafts, steamboats or other water crafts; and the piers shall not be so placed as to interfere with two boats proceeding out with their tows made up, and shall be constructed in such manner as to meet the requisitions of the law in regard to the obstructions of navigation."

There is no evidence whatever offered in the case that the Union Bridge Company had violated these provisions of its charter. The Government offered no affirmative proof whatever of that question. As before said, the whole case of the Government was the non-observance of the order of the Secretary of War, dated January 20th, 1906, as to the reconstruction of the bridge. The question whether the Union Bridge Company had complied with the provisions of its charter in the erection of its bridge so as not to interfere

with passing boats, etc., was not a question, and could not be a question in the Federal Courts. In the absence of any complaint on the part of Pennsylvania that the bridge had not been constructed in accordance with the terms of its charter, the Federal Courts would be powerless to raise that question. That was a question between the State of Pennsylvania and the Union Bridge Company. It was a state question and not a Federal question. True, Pennsylvania by her acquiescence in the construction of the bridge, affirmatively asserts its approval of said bridge, but whether it did or not could not aid the Government in this case. The Federal Government may not enforce the terms of the state charter. This has been distinctly ruled by this court.

In *The Willamette Iron Bridge Co. vs. Hatch*, 125 U. S., 2, this question was distinctly ruled by this court, and the court said:
(p. 8):

> "The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced (a point which we do not undertake to decide), it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States. Such obstructions and nuisances are offenses against the laws of the State within which the navigable waters lie, and may be indicted or prohibited

as such; but they are not offenses against the United States laws which do not exist; and none such exist except what are to be found on the statute book. * * * The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable, or not conformable, to the state law relied on, is a state question, not a Federal one. The failure of state functionaries to prosecute for breaches of the state law, does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence. * * * But it is well settled that the legislatures of such states do have the same power to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits, as have the original States, in reference to which no such clause exists. It was so held in *Pound vs. Turck*, 95 U. S., 459, in reference to a dam in the Chippewa River in Wisconsin; in *Cardwell vs. American Bridge Company*, 113 U. S., 205, in reference to a bridge without a draw, erected on the American River in California, which prevented steamboats from going above it; and in *Hamilton vs. Vicksburg, &c., Railroad Co.*, 119 U. S., 280, relating to railroad bridges in Louisiana; in all which cases the clause in question was in force in the States where they arose, and in none of them was said clause held to restrain in any degree the full power of the State to make, or cause to be made, the erections referred to, *which must have been more or less obstructions and impediments to the navigation of the streams on which they were placed.* * * * In *Hamilton vs. Vicksburg, &c., Railroad Co.*, it was said: 'Until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary. When the State provides for the form and character of the structure, its directions will control, except as against

the action of Congress, whether the bridge be with or without draws, and irrespective of its effect upon navigation.' "

In the *Monongahela Nav. Co. vs. The U. S.*, 148 U. S., 325, in the charter of the Navigation Company the State had reserved the right to take its property on paying the original cost of construction and interest, but this Court said the Federal Government could not avail itself of this, page 344:

> "Again the State has never assumed to exercise any rights reserved in the charter or by any supplement thereto. So far as the State is concerned all its grants and franchises remain unchallenged and undisturbed in the possession of the Navigation Company. The State has never transferred, even if it were possible for it to do so, its reserved rights to the United States Government and the latter is proceeding not as the assignee, successor in interest or otherwise of the State, but by virtue of its own inherent supreme power. What the State might or might not do is not here a matter of question, though doubtlessly the existence of this reserved right to take the property upon certain specified terms may often, perhaps in the present case, materially affect the question of value."

It seems impossible that the Government could avail itself of the provisions of the charter of the Union Bridge Company, and for this reason:

The question as to how far the traffic on a river shall submit itself to inconvenience because of the construction of bridges for the traffic across the river, is a relative one and one which each of the Sovereign States posseses, subject to the direct action of Congress. So long as Congress does not act, the discretion of the state as to how a bridge should be erected, and what its height shall be over the water, etc., is

for the State of Pennsylvania, and not for the Federal Government. Pennsylvania did exercise her discretion by acquiescing in the construction of the Union Bridge.

In *Gilman vs. Philadelphia*, 3 Wall., 714, this court said:

> "It must not be forgotten that bridges, which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs.
>
> *It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other.*"

Pennsylvania has exercised her discretion by approving of the Union Bridge as constructed. How would it be possible for the Federal Government to now usurp the power of the State of Pennsylvania to disapprove the same under the terms of the charter? Remember, disapprove the same for the State of Pennsylvania, not for the United States.

THIRD. THE UNION BRIDGE WHEN ERECTED IN 1874 WAS A LAWFUL STRUCTURE. IT WAS DIRECTLY AUTHORIZED BY THE STATE OF PENNSYLVANIA AND APPROVED OF BY THAT STATE ACQUIESCING IN ITS CONSTRUCTION FOR OVER THIRTY YEARS. IT WAS INDIRECTLY, BUT AFFIRMATIVELY AUTHORIZED BY THE UNITED STATES GOVERNMENT BECAUSE THAT GOVERNMENT BY ITS INACTION AS TO THE ALLEGHENY RIVER AUTHORIZED AFFIRMATIVE ACTION BY THE STATE OF PENNSYLVANIA IN THE ERECTION OF BRIDGES OVER THAT RIVER.

The bridge connects two of the largest cities in Pennsylvania, Pittsburgh and Allegheny City, the traffic between which

is enormous. The Allegheny river was not then as a fact navigable except during freshets, and then only for light draught vessels. Whether, and if any, to what extent, the traffic along the river under the bridge should submit to interruption and inconvenience so as to enable and accommodate traffic over the bridge was in 1873-1874 a question the Federal Government submitted to the State of Pennsylvania to determine. It was a question of discretion and not of absolute verity. The advantages and disadvantages of the construction of the bridge by the erection of piers in the rivers, etc., had to be considered and determined. *Being then determined by the State of Pennsylvania in favor of the erection of the bridge, and this with the approval and the acquiescences of the United States Government, and the Union Bridge Company having invested its money, over* $310,000 *in the erection of the bridge, the bridge became the private property of the Union Bridge Company.*

Any erection on or across a river must of necessity to some extent interfere with navigation. Piers which support a bridge must be under it and must have the bed of the river for their foundation and support, and this is particularly so in the kind of bridges that are erected over the Western rivers. Abutments are in the bed of the river or on the river shore, affecting the rise and flow of the river.

The superstructure itself must be of such height as will reasonably accommodate the traffic over it, and this moderate heighth to some extent will interfere with the navigation of the river, as the highest vessels will have difficulty in some stages of high water in passing under the bridge.

This being necessarily so the direct question whether as a fact a bridge is or is not any obstruction to navigation does not arise. The question ordinarily is, is the bridge erected under State or Federal power? If it is, it is a lawful structure no

matter what its height, or how much it interferes with navigation. In the sovereign—(the State in the absence of Federal legislation—)the United States Government when it affirmatively and directly acts—is this power lodged. Action by either makes the structure lawful. Just as much under State as under Federal legislation is this so and must be so. It is the discretion of the power in existence at that time when the bridge is erected which must of necessity determine its construction, and such determination must be conclusive and fix definitely the fact that it is a lawful structure. The State or the Federal Government, no more than the individual can foresee the future and tell how in the future years the bridge will affect navigation under it. Both governments act as the individual does under the circumstances surrounding him or it, and if either the State or the Federal Government authorizes the erection of the bridge in a certain way, or approves by acquiescence of a bridge in a certain way the bridge becomes a lawful structure.

It is always a question of discretion in the State or the United States, and especially if both approved the bridge is a lawful structure.

This has been ruled by this Court in a number of cases, but perhaps in no case so markedly as in the *Wheeling Bridge case,* 13 Howard, 518. There this Court as well as the Circuit Court below in a bill filed in the Circuit Court of the United States held, that Congress had elected to and had taken affirmative jurisdiction over the Ohio river and that the Wheeling Bridge, though erected under a statute of Virginia, was an unreasonable obstruction to the navigation of the Ohio river and, therefore, should be altered.

Subsequently, and after this judgment of the Court, Congress passed an act declaring that the bridge was not an obstruction to navigation, and thereupon this Court, 18 Howard,

421, held that the bridge by reason of this act of Congress became a lawful structure and not an interference with navigation or an obstruction of the same. This Court there said:

> "So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress, they are to be regarded as modified by this subsequent legislation, and *although it still may be an obstruction, in fact it is not so in the contemplation of law.* We have already said, and the principle is undoubted, that the act of legislature of Virginia had conferred full authority to erect and maintain the bridge subject to the exercise of the power of Congress to regulate the navigation of the river. That body having in the exercise of this power regulated the navigation consistent with its preservation and its continuation, the authority to maintain it would seem to be complete. * * *"

Again on page 431 this Court said:

> "The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation; and that power, as we have seen, has been exercised consistent with the continuance of this bridge. * * * In cases where *these erections or obstructions to navigation are constructed under a law of the state, or sanctioned by legislative authority, they are neither a public nuisance subject to abatement,* nor is the individual who may have sustained special damage from their interference with the public use entitled to any remedy for his loss. So far as the public use of the stream is concerned, the legislature having the power to control and regulate it, the *statute authorizing the structure, though it may be a real impediment to navigation, makes it lawful.*"

Chief J. Taney in his dissenting opinion in the *Wheeling Bridge Co. case*, 13 Howard, 648, said:

> "The rule as to navigable waters is this: Every independent nation has the exclusive jurisdiction over the navigable waters lying within its territorial limits. It has the right to regulate commerce upon them, and to determine what bridges may be built over them, or piers or wharves extended into them. *And an erection authorized by the legislature cannot be a nuisance, public or private.* This was the situation of the old States prior to the adoption of the constitution. Each was then an independent, sovereign State. But by the constitution of the United States, they surrendered to the general government the power to regulate commerce. And thus, while they retain their absolute territorial jurisdiction over their navigable waters in all other respects, congress may forbid the erection of any structure in a navigable stream, which it deems an obstruction to commerce, and may declare it a nuisance, and direct it to be removed. But all the original authority of the State over the river remains subject to that limitation. For otherwise, until congress thought proper to legislate, navigation on the river would be under no control. * * *"

The Chief Justice again said, p. 657:

> "It is sufficient to say, that in all questions of this kind, the general convenience and interest of the public in the travel and trade across the river, as well as on its waters, must be taken into consideration. For whether it is a public nuisance or not, depends upon whether it is or is not injurious to the public. The cases in the state courts, and in the circuit courts of the United States, referred to in the argument, which I shall not stop here to examine, in my opinion maintain this doctrine. And upon principle, independently of

adjudications, it cannot be otherwise. A structure which promotes the convenience of the public, cannot be a nuisance to it."

In the *Bridge Company vs. The United States*, 105 U. S., p. 470, the Chief Justice, delivering the opinion of the Court, said, page 480:

"In *State of Pennsylvania vs. The Wheeling Bridge Co.* (13 Howard, 518), it was judicially settled in this court that a bridge as constructed did illegally interfere with navigation; but when afterwards Congress, in the exercise of its constitutional authority to regulate commerce, legalized the structure by a legislative enactment, the court held (18 Howard, 421) that this act of legislative power removed the objection to the further continuance of the bridge, because, in the opinion of the legislative department of the government, the obstruction which had been erected was no more than those interested in navigation should submit to for the general good. * * *

"As has been seen, congressional assent to a substantial obstruction was recognized as sufficient to prevent the execution of a decree of this court requiring the abatement of what but for this assent, would have been, in the judgment of the court, a public nuisance."

In that case in the dissent of Mr. Justice Field, page 494, he stated as follows:

"By free navigation is not meant a navigation entirely clear of obstructions. In the sense in which these terms are used by European jurists, the navigation of a river is free, when it is not entirely interrupted, and not embarrassed by oppressive duties exacted by riparian States. In this country, the navigation of a river is deemed to be free, when it is kept open for vessels cleared of such physical obstructions as would retard their pass-

age beyond what is required for the necessary transit over the stream, and is exempt from exactions and delays other than for the enforcement of quarantine and health laws; and such occasional tolls as may be levied to meet the expenses of improving its navigation. The delays attendant upon the necessary transit of persons and property, or the enforcement of quarantine and health laws, or the exaction in exceptional cases of tolls, are not deemed to be inconsistent with the free navigation of the river in the legal sense of those terms."

Mr. Justice Bradley in the same case, p. 507, said:

"By virtue of its plenary power to regulate commerce among the several States, as well as with foreign nations, Congress may undoubtedly require the removal of all nuisances and unlawful obstructions in the navigable rivers of the United States, without giving compensation to any persons who may be incidentally affected. It also has the power to improve the navigation of such rivers; but in making or authorizing improvements, other than the removal of unlawful obstructions, it cannot take private property without complying with that clause of the Fifth Amendment to the Constitution which declares, 'Nor shall private property be taken for public use without just compensation.' This proposition would be conceded where property taken for that purpose consists of lands, houses, buildings, or other structures standing on the natural banks of a river; but I think that it is equally true where erections are made on the margin of a river, *or where a bridge is constructed across it, in accordance with the laws of the State and with the consent of Congress.* Such *structures are lawful* and *are private property,* entitled to the constitutional protection. That which is lawful *is not a nuisance,* and cannot be *prostrated* or removed as such without compensation."

In *Miller against the Mayor of New York,* 109 U. S., 392, this Court, speaking of the power of Congress, said:

> "Its power, therefore, to determine what shall not be deemed, so far as commerce is concerned an obstruction, is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on condition that a bridge of a particular height shall not be deemed such an obstruction."

In the *Willamette Iron Bridge Co. vs. Hatch,* 125 U. S., 2, this court, *inter alia,* approved the prior decisions in *Hamilton vs. Vicksburg Railroad Co.*:

> "Until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary. When the State provides for the form and character of the structure, its directions will control, except as against the action of Congress, whether the bridge be with or without draws, and *irrespective of its effect upon navigation.*"

In *Cardwell vs. American Bridge Co.,* 113 U. S., 208, a bill was filed to prevent the erection of a bridge over the American river in California, and Mr. Justice Field, in delivering the opinion of this court, said, after citing many of the prior cases of this court, as follows:

> "In these cases the control of Congress over navigable waters within the States so as to preserve their free navigation under the commercial clause of the Constitution, the power of the States within which they lie to authorize the construction of bridges over them until Congress intervenes and supersedes their authority, and the right of private parties to interfere with their construction or continuance, have been fully considered, and we are entirely satisfied with the soundness of the conclusions reached. They recognize the full power of the States to regulate within their limits matters of internal

police, which embraces among other things *the construction, repair and maintenance of roads and bridges,* and the establishment of ferries; that the States are more likely to appreciate the importance of these means of internal communication and to provide for their proper management, than a government at a distance; *and that, as to bridges over navigable streams, their power is subordinate to that of Congress,* as an act of the latter body is, by the Constitution, made the supreme law of the land; *but that until Congress acts on the subject their power is plenary.*"

The Court then cited and considered the case of *Gilman vs. Philadelphia,* where under a State law a bridge was erected, which to a very great extent interrupted navigation, and said, p. 209:

"But the Court held that the State had not exceeded the bounds of its authority in permitting its construction, and until the power of the Constitution was made effective by appropriate legislation the power of the *State was plenary,* and its exercise in good faith could not be made the subject of review. The Court observed that it was not to be forgotten *that bridges which are the connecting parts of turnpikes, streets and railroads are means of commercial transportation as well as navigable waters;* that the commerce which passed over a bridge might be much greater than would be transported on the water obstructed; *and that it was for the municipal powers to weigh the considerations that applied to the subject and to decide which should be preferred, and how far either should be made subservient to the other.*"

In the case of the *Monongahela Navigation Co. vs. United States,* 148 (p. 325), this Court reviewing its own de-

cisions on the question in reference to the State laws authorizing the erection of dams, booms, piers, etc., said, page 331:

> * * * "Which are substantially obstructions to general navigation, and more or less to rafts and barges. But to the legislature of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. * * * If in the opinion of the State greater benefit would result to her commerce by the improvements made, than by leaving the river in its natural state,—and on that point the State must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. * * * How the highways of a state whether on land or by water shall be best improved for the public good is a matter for state determination, subject always to the right of Congress to interpose in the cases mentioned. * * * And while this Court had maintained in many cases the right of the states to authorize structures in and over the navigable waters of the states which may either impede or improve their navigation, in the absence of any action of the general government in the same matter, the doctrine has been laid down with unvarying uniformity, that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under state authority."

FOURTH: AS THE BRIDGE WAS THEN ERECTED UNDER STATE AUTHORITY WITH THE CONSENT OF THE UNITED STATES GOVERNMENT, IT BECAME AND WAS THE PRIVATE PROPERTY OF THE UNION BRIDGE COMPANY, AND NOT EVEN THE UNITED STATES GOVERNMENT CLAIMING ITS SOVEREIGN RIGHT UNDER THE COMMERCE CLAUSE COULD TAKE THAT BRIDGE FOR PUBLIC USE, WITHOUT DUE COMPENSATION, OR DEPRIVE THE UNION BRIDGE COMPANY OF IT WITHOUT DUE PROCESS OF LAW. THIS HAS BEEN AFFIRMATIVELY MAINTAINED BY THIS COURT IN THE FOLLOWING CASES:

In the case of the *Monongahela Navigation Co. vs. United States,* 148 U. S., 312, the court considered various questions, and among the others, the question of the right of the Federal Government to take or destroy the locks and dams which the Navigation Company had erected in the Monongahela River in the State of Pennsylvania, under authority from the State of Pennsylvania.

On page 324 this court said:

"In the case of *Sinnickson vs. Johnson,* 17 N. J. L. (2 Harr.), 129, 145, cited in the case of *Pumpelly vs. Green Bay Company,* 13 Wall., 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner vs. Newburgh,* 2 Johns. Ch., 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it pre-

vents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

The court after fully considering and approving that the power itself in the National Government is derived from the Commerce clause of the Constitution whereby it might regulate and control all the highways of Interstate commerce, said:

"It cannot be doubted, in view of the long list of authorities—for many more might be cited,—that Congress has the power in its discretion to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words, it is within the competency of Congress to make such provision respecting the improvement of the Monongahela River as in its judgment the public interests demand. Its dominion is supreme.

But like the other powers granted to Congress *by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment,* we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish postoffices and postroads; but, if Congress wishes to take private property upon which to build a postoffice, it must either agree upon the price

with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the State, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a postoffice is equally true when condemnation is sought for the purpose of improving a natural highway. * * * So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the government, in the exercise of its sovereign power, takes the property."

In this same case the Court considered the question of the nature of the title which the Monongahela Navigation Company had to its plant, and it considered the opinions and cases which seemed to declare that Congress might at any time assume jurisdiction over the river across which the bridge was constructed, and on which the navigation was carried on, and that thereupon it might destroy any structure in the river or across the river which had been erected merely by state

authority. Thus, in the *Bridge Company vs. United States,* 105 U. S., 482, it had been said in the opinion:

> "Those who act on state authority alone necessarily assume all the risks of legitimate Congressional interference."

In the *County of Mobile vs. Kimball,* 102 U. S., 696, where it was said that when Congress acts

> "the State authority is superseded."

In *Wisconsin vs. Duluth,* 96 U. S., 379, where it was said that whenever Congress acts it has taken charge of the matter, and its right to an exclusive control has not been denied.

And again in the same case that:

> "The doctrine has been laid down with unvarying uniformity, that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under State authority."

In *Willamette Iron Bridge Co. vs. Hatch,* 125 U. S., 8, where it was said:

> "When Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been, and preventing any others from being made."

In *Stockton vs. Baltimore & N. Y. R. R. Co.,* 32 Fed Rep., 16, Mr. Justice Bradley said:

> "So wide and extensive is the operation of this power that no State can place any obstruction in or upon

any navigable water against the will of Congress, and Congress may summarily remove such obstruction at its pleasure."

Notwithstanding these cases, this court said in the *Monongahela Navigation case*, 148 U. S., 341:

> "The theory of the government seems to be, that the right of the Navigation Company to have its property in the river, and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there, and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can any private property belonging to an individual."

Again on page 343, it was said:

> "It is also suggested that the government does not *take* this franchise; that it does not need any authority from the State for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company, which owned it, *is deprived of it.* The Government takes it away from the company, whatever use it may make of it; and the question of just compensation

> is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually *deprived of the franchise to collect tolls,* just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the *franchise of which he is deprived.*"

If the Union Bridge was *taken* by the United States Government, there could be no doubt of the proposition that under its charter from the State of Pennsylvania and under authority of the Monongahela Navigation Company case just cited, the Union Bridge Company would be entitled to compensation for the value of the bridge.

But the Secretary of War's order of January 20, 1905, requires the removal of our present bridge and the erection of a new one. Its phraseology, it is true, is that the bridge be altered, but the alteration means the construction of a new bridge—instead of the present structure with five spans, four piers—of a superstructure 38 feet high, this order requires a new structure with two navigable spans of 394 feet width with a height of 70 feet, and then adds (90)

> "that all parts of the old structure not comprised in the new construction and in conformity with the above requirements *shall be removed.*"

Clearly this ordered us to tear down our old structure and erect a new one.

If the Government had bodily entered upon and itself removed or torn down our bridge that would have been a technical *taking* and we would be entitled to compensation under the Monongahela Nav. Co. case. But what real difference is there between the Government itself taking possession

or tearing down and compelling us to do the same. When it does so compel us we become its agents as truly as its soldiers or officers would be and we are by its order deprived of our property.

The cases in this court do not adhere to the strict technical doctrine that prevailed in some of the States, notably Pennsylvania, that the owner of property could not recover for consequential damages. This has since been modified in Pennsylvania by the new Constitution of 1874, but it did formerly prevail with great strictness.

This never was, however, the doctrine in the Federal Courts, but it is believed to be a fair statement of the Federal Court doctrine, that property that is injured or destroyed by the United States Government is as much *taken* from the owner thereof as if the Federal Government itself should enter into bodily possession. This is well illustrated in the case of the *United States vs. Lynah*, 188 U. S., 469.

In that case the Government was improving the Savannah River, and by the erection of a dam it raised the water so as to overflow the land of plaintiff to such an extent as to cause a total destruction of its value. In a proceeding to recover the value of the real estate, the Government defended on the ground that the property was not taken, and that it was not liable for consequential damages by reason of the overflow of the land, and that it was a fact that the Government had never taken actual possession of the land itself, but the title and possession of it remained in the former owner.

On page 468 the court said:

"Was there a taking? There was no proceeding in condemnation instituted by the government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the land-

owner to the government, and if either of these be an essential element in the taking of lands within the scope of the Fifth Amendment, there was no taking.

* * * It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken. Does this amount to a taking? The case of *Pumpelly vs. Green Bay Company*, 13 Wall., 166, answers this question in the affirmative. And on the argument it was conceded by the learned counsel for the government (and properly conceded in view of the findings) that so far as respects the mere matter of overflow and injury there was no substantial distinction between the two cases. In that case the Green Bay Company, as authorized by statute, constructed a dam across Fox River, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land. Referring to this it was said (p. 177):

'The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

It would be a *very curious* and *unsatisfactory* result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the *government refrains from* the

absolute conversion of real property to the uses of the public *it can destroy its value entirely, can inflict irreparable and permanent injury* to any extent, can, in effect, *subject it to total destruction without making any compensation,* because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.'

Reference was also made to the case of *Sinnickson vs. Johnson,* 2 Harr. (17 N. J. Law), 129, in respect to which it was said: 'The case is mainly valuable here as showing that overflowing land by backing water on it was considered as "taking" it within the meaning of the principle.' Again, on page 179, it was said: 'But *there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property* may be, in the language of Mr. Angell, in his work on Water Courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken.' And in a foot-note the following authorities were cited: *Angell on Water Courses,* sec. 465a; *Hooker vs. New Haven & Northampton Co.,* 14 Connecticut, 146; *Rowe vs. Granite Bridge Corporation,* 21 Pick., 344; *Canal Appraisers vs. The People,* 17 Wend., 571, 604; *Lackland vs. North Missouri Railroad Co.,* 31 Missouri, 180; *Stevens vs. Proprietors of Middlesex Canal,* 12 Massachusetts, 466.

It is clear from these authorities that where the Government by the construction of a dam or other public works so floods lands belonging to an individual as *to substantially destroy* their value their is a taking

within the scope of the Fifth Amendment. While the Government does not directly proceed to appropriate the title, yet it takes *away the use and value;* when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner."

But if the Bridge Company is *deprived* of its property by the Government itself removing it or compelling the Bridge Company to remove it, is not the Company just as certainly *deprived* of its property as if the Government had entered into possession of it and occupied it. To compel us to remove *takes our property;* deprives us of its use: absolutely and explicitly puts it beyond our possession or control and takes it away from the only place where it can be of any value as a bridge.

Not only this, but the State of Pennsylvania authorized us to collect tolls for the use of the bridge, and by compelling its removal the Government deprives us of this right, which in the Monongahela Nav. Co. was held to be property and for which the Company was given compensation. Whether you deprive one of the use of his land by overflowing it—or deprive of the use of his bridge by removing it in either case you injure him just as much as if you went into exclusive possession.

Then, too, the Government orders us to build a new bridge. The order calls it an *alteration,* but it is really a new bridge. It will cost $459,000 to erect it, and this exclusive of

the land damages. This certainly *takes* our money for Governmental purposes. It deprives us of it by a mere arbitrary ruling of the Chief of Engineers without any hearing or opportunity to be heard.

See also:

Yates vs. Milwaukee, 10 Wallace, 497.
Scranton vs. Wheeler, 179 U. S., 146.

In *Scranton vs. Wheeler*, 179 U. S., 146, the Court below, the Circuit Court of Appeals (57 Fed. Rep., 803), held that:

> "A distinction exists between those cases where, under authority of the State, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under the authority of subsequent Congressional legislation. In such case, the improvement, being by authority of law, can only be taken for public uses upon just compensation. This is the doctrine of the case of *Monongahela Navigation Co. vs. United States*, 148 U. S., 312. In that case it was held that not only must the actual property of the owner in the structure, but his franchise also, must be paid for."

The question resolves itself then into this:

May the Federal Government without compensation compel the Union Bridge Company to remove its superstructure and build in its place another on the ground that it does not constitute the *taking* of property?

Under the cases just cited, and especially the Monongahela Navigation case, the government could not *take* the property. May it compel us to destroy it, for a removal of the superstructure and the piers is really a destruction of

them, and prevents us from using them as authorized under our charter. It does *take* from us our property from the location where it is of any practical use. It *takes* from us our franchise to take tolls because its order deprives us from collecting any. It takes our money to build the new bridge, and this not under any decision of the Secretary of War, but that of the Chief of Engineers.

Chicago, Burlington & Quincy Railroad Co. vs. Chicago, 166 U. S., 235; *Transportation Co. vs. Chicago,* 99 U. S., 635; *New Orleans as Light Co. vs. Drainage Commission of New Orleans,* 197 U. S., 453; *West Chicago Railroad Co. vs. Chicago,* 201 U. S., 506, are all cases arising under the exercise of the police power in the respective states, and may all be classified under that head. In each case the injury done was the indirect and consequential result of a lawful exercise by the state of its police power, and in no one of the cases was there any contract (if any such might lawfully be), whereby the state agreed with the party injured not to exercise that power. In no one of them was there any actual destruction of property or any taking. Each case was decided on its peculiar facts and the Federal questions were only whether the State in either case had violated the Federal Constitutional provisions as to private property.

All of these authorities have been examined and commented upon in the opinion of this court by Mr. Justice Harlan in the Illinois Drainage case, and quoting from the decisions in these different cases, and considering the subject, laid down the law as follows:

> "Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power

rests are in every case the same. This power, as said in *Carthage vs. Frederick,* 122 N. Y., 268, * * * has always been exercised by municipal corporations, 'by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare.' The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If, in the execution of any power, no matter what it is, the government, Federal or State, finds it necessary to take private property for public use, it must obey the constitutional injunction or make or secure just compensation to the owner. * * * Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that gen-

eral power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given.'"

The test according to this opinion is whether

> "the injury complained of is only incidental to the legitimate exercise of Governmental powers for the public good."

If it is only *incidental,* then there is no taking of property, and a right of compensation does not accrue.

Mr. Justice Holmes, with whom concurred Justices White and McKenna, filed a concurring opinion, in which they claimed that the public authority

> "has a right to widen or deepen a channel if it sees fit, and that any cost that the railroad is put to in building a bridge, the railroad must bear. But the public must pay for the widening or deeping, and I think that it does not matter whether what it has to remove is the original earth or some other substance *lawfully put in the place of the original earth.* Very likely in this case the distinction is of little importance, but it may be hereafter. I suppose it to be plain, as my brother Brewer says, that if any expense is thrown upon the railroad unlawfully, its property *is taken* for public use without due compensation."

In *New Orleans Gas Light Co. vs. Drainage Commission,* 197 U. S., 453, the Gas Light Company had the exclusive right to supply New Orleans with gas, and to occupy its streets with its pipes and mains, but it had no contract with the City of New Orleans as to where those pipes or

mains should be laid, and whether they should be changed or not. A system of drainage was created by the state, and in the digging of sewers it became necessary to have the New Orleans Gas Company change the location of their pipes and mains in the streets.

The court (p. 455) said:

> "After adopting a system of drainage, and proceeding with the construction thereof, according to the plans, it was found necessary to change the location in some places in the streets of the city of the mains and pipes theretofore laid by the New Orleans aGs Light Company. The testimony shows that there was nothing to indicate that these changes were made in other than cases of necessity and with as little interference as possible with the property of the gas company."

This court held that the drainage of a city in the interest of the public health was a legitimate exercise of the police power, and that as in the exercising of this police power there was no interference with the property of the company except that which was necessarily *incidental*, that the gas company had no claim against the Drainage Commission.

This court (p. 461) said:

> "It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them, and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the State might require for a necessary public use that changes in location be made.

> This right of control seems to be conceded by the learned counsel for the plaintiff in error, in so far as it relates to the right to regulate the use of the surface of the streets, and it is recognized that the users of such surface may be required to adapt themselves to regulations made in the exercise of the police power. We see no reason why the same principle should not apply to the sub-surface of the streets, which, no less than the surface, is primarily under public control. The need of occupation of the soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage, and every reason of public policy requires that grants of rights in such sub-surface shall be held subject to such reasonable regulation as the public health and safety may require. There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the State to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare."

This case, then, decided nothing but that New Orleans had not granted away its police power; the gas company did not have any contract with New Orleans as to where its pipes should be laid, and the Court properly held that legislation which compelled the removal of the pipes because of a new drainage system in the town should be paid for by the Gas Co.

In the *Chicago Tunnel case,* 201 U. S., 506, a municipality gave permission to a street railway company to construct the tunnel under navigable stream, but the law of the state provided that railways should not be constructed as to interrupt the navigation of any water in the state. It was

held by the Supreme Court of Illinois that the railroad company took its privilege subject to the legitimate exercise of the police power of the state, and especially subject to the provisions of the state law that its railroads should not interfere with navigation, and that as the state, acting through the municipality, determined that the necessities of navigation required a deeper channel, it was within the power of the state to compel the railroad company to make its tunnel comply with this provision for navigation. (See *West Chicago Railway Co. vs. People*, 214 Ill., 9.)

This court decided that there was no contract in the case that Illinois would not deepen the channel; that it could not be considered as a taking of private property; that it was not an arbitrary or unreasonable demand, and that the state only insisted that the company should not use its property so as to interrupt navigation.

In both the Drainage case and the Tunnel case the right of the State or the City was sustained in the Supreme Court of Illinois as a state question.

West Chicago Street Railway Co. vs. People, 214 Ill., 9.

Chicago, Burlington & Quincy Railway Co. vs. People, 212 Ill., 103.

The present case comes under another class of cases, and among them are the following:

U. S. vs. Lynch, 188 U. S.

Monongahela Navigation Co. vs. United States, 148 U. S., 312.

Transportation Co. vs. Chicago, 99 U. S., 635.

Scranton vs. Wheeler, 179 U. S., 146.

Yates vs. Milwaukee, 10 Wallace, 497.

In *Scranton vs. Wheeler* the question arose because of the construction of a pier in the St. Mary's River. Congress had granted the State of Michigan the right to locate a canal, and the pier was erected by the State of Michigan under that grant. The erection of the pier indirectly affected the access of the plaintiff to the channel of the river.

The Circuit Court, as to the right of Congress to regulate commerce, and that there is a distinction between that which is *jus privatum* and that which is *jus publicum*, said:

> "A distinction exists between those cases where, under authority of the State, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under the authority of subsequent Congressional legislation. *In such case, the improvement, being by authority of law, can only be taken for public uses upon just compensation. This is the doctrine of the case of Monongahela Navigation Co. vs. United States*, 148 U. S., 312. In that case it was held that not only must the actual property of the owner in the structure, but his franchise also, must be paid for. The plaintiff in the case before us has made no improvements for either public or private uses. No property of his has been invaded, none has been taken. The title in him was subject to the public uses. He held the soil under the river subservient to the purposes of navigation. The right to regulate commerce involved the right to regulate navigation, and this, in turn, involves the necessary uses of the submerged lands, in so far as such use was essential to the maintenance of the public highway. * * * The plaintiff has no such ownership of the *locus in quo* as makes its use for the purposes to which it has been devoted a taking of private property within the meaning of the Constitution."

The judgement was affirmed by this court where it was, *inter alia,* said (page 153):

> "What is private property within the meaning of that amendment or what is a taking of private property for public use is not always easy to determine. *No decision of this Court has announced a rule that will embrace every case.*"

The Court *inter alia* further said quoting from the opinion of Mr. Justice Bradley in *Stockton vs. Baltimore Railroad Company,* where he was considering the right of a railroad to erect the piers of a bridge in a navigable water, that Congress had the power to regulate commerce by directly or indirectly authorizing the erection of a bridge over a navigable stream, and added (p. 160):

> "We think that the power to regulate commerce between the states extends not only to the control of the navigable waters of the country and the lands under them for the purpose of navigation, but for the purpose of erecting piers, bridges and all other instrumentalities of commerce, which in the judgment of Congress may be necessary or expedient."

See the dissenting opinion in that case where the authorities are fully reviewed.

Yates vs. Milwaukee, 10 Wallace, 497, the owner of land bounded by a navigable river it was held had the right as property owner to free access to the navigable part of the stream, and that an ordinance of the City of Milwaukee establishing dock and wharf lines and which declared that a private wharf on the plaintiff's land was a nuisance and must be removed was illegal, and that the question of nuisance or obstruction must be determined by general and fixed laws, and in accordance with the law of the land. The Court *inter alia* said, page 504:

"The act of Wisconsin legislature approved March 31, 1854, confers upon the City of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menomonee and restrain and prevent encroachments upon said river and obstructions thereto, and it is by this statute that the summary proceedings for the removal of appellant's wharf are supposed to be authorized. But the mere declaration of the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or state, within which a given structure can be shown to be a nuisance, can by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. * * * (p. 507): And that if the authorities of the City of Milwaukee deemed its removal necessary in the prosecution of any general scheme of widening the channel and the improving of the navigation of the Milwaukee river *they must first make him compensation for his property so taken for the public use.*"

In the *Bridge Co. vs. United States,* 105 U. S., 492, Mr. Justice Field, dissenting, said:

"The conclusion I draw is that a bridge constructed by the authority of a state, if it does not interfere with the free navigation of the stream, is a lawful structure, and can neither be taken nor destroyed by Congress or by the state except as other private property may be thus taken, that is, for public purposes upon making just compensation."

He defined on page 495 what he meant by *free navigation*, by saying:

> " * * * The navigation of a river is free when it is not entirely interrupted."

In *Crenshaw vs. The Slate River Co.*, 6 Rand. (Virginia), a mill had been established and a dam erected under a law granting to the mill owner the use of the water for grinding, but after the dam was erected, a subsequent act imposed on the farmer the duty of erecting locks through his dam and keeping them in repair, and on his failure to do so, directed that his dam should be declared a nuisance and abated. The Court held that this was unconstitutional and void, and a taking of private property for public use without compensation, and added:

> "There are many ways of taking property other than by occupation or appropriation, which are within the constitutional inhibition. If its beneficial use and enjoyment are prevented under the sanction of law, it is taken from him as effectually as though the title were condemned."

In *Pumpelly vs. Green Bay Co.*, 13 Wall., 166, the land was flooded by a dam which was authorized by law, and the Court *inter alia*, said:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict

irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

In *The Proprietors of the New Bedford Bridge*, 2d Gray, (Mass.), the building of a bridge with two suitable draws over a navigable stream was authorized, and the bridge was accordingly built. A subsequent Act required the legislature to make in lieu of one of these two draws a new draw of not less than sixty feet in width. The Court held that as the bridge was lawfully constructed under the authority of the law, the owners could not be compelled to make these changes without compensation, and added:

" * * * The question whether the draws already made were suitable, that is, constructed so as not unreasonably or unnecessarily to obstruct or impede navigation of the river, was not a question to be determined absolutely by the legislature or by the proprietors, when disputed between the parties. Like all other matters involving a controversy concerning the public duty and private rights,' said the Court, 'it is to be adjudged and settled in the regular tribunals where questions of law and fact are adjudicated, on fixed and established principles, and according to the forms and usages best adapted to securing the impartial administration of justice.' "

In *Turner vs. Williams*, 194 U. S., 279, the former ruling of the Supreme Court in *Wong vs. Wing* (163 U. S. 228), was approved, and the Court said:

> "We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.
>
> But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation to be valid, must provide for a judicial trial to establish the guilt of the accused. No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

In *United States vs. Lynah*, 188 U. S., 469, in the improvement of the Savannah River, a rice plantation was over-

flown, and the Court held that this constituted a taking within the meaning of the Constitutional amendment, and on page 470 said:

> "But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of the property may be in the language of Mr. Angel in his work of Water Courses, equivalent to the taking of it, and that under the Constitutional provisions it is not necessary that the land should be absolutely taken. * * * It is clear from these authorities that where the Government by the construction of a dam or other public work so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the 5th amendment. While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."

And on page 473 the Court said:

> "And of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

In *Woodward vs. Central Vermont Railway Co.*, 180 Mass. 602, a statute compelling the railroad company to pay certain money, was held to be the taking of private property.

FIFTH. THE POWER OF CONGRESS TO REGULATE COMMERCE IS RESTRICTED BY THE PROVISION OF THE FEDERAL CONSTITUTION THAT PRIVATE PROPERTY SHALL NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION, NOR DEPRIVE ONE OF PROPERTY WITHOUT DUE PROCESS OF LAW. NO POWER IS GIVEN TO ANY DEPARTMENT OF THE UNITED STATES GOVERNMENT TO DESTROY PRIVATE PROPERTY WITHOUT GIVING THE OWNER AN OPPORTUNITY TO BE HEARD ON THE QUESTION AS TO WHETHER IT IS OR IS NOT A NUISANCE OR SUBJECT TO SUCH DESTRUCTION. ADMITTING FOR THE SAKE OF ARGUMENT THAT CONGRESS MIGHT DECREE BY AN EXPLICIT AND EXPRESS ACT, ANY BRIDGE OVER ANY RIVER A NUISANCE AND AN UNLAWFUL OBSTRUCTION, IT IS SUBMITTED THAT BEFORE CONGRESS COULD CARRY INTO EFFECT THAT JUDGMENT THE OWNER OF THE PROPERTY HAS A RIGHT TO BE HEARD ON THE QUESTION WHETHER AS A FACT IT IS A NUISANCE AND INTERFERES WITH NAVIGATION. UNLESS AS A FACT IT IS SUCH A NUISANCE AND INTERFERENCE, EVEN CONGRESS CANNOT DESTROY IT AND REMOVE IT WITHOUT COMPENSATION.

Congress undoubtedly may by its technical declaration make it for some purposes an unreasonable interference with commerce, but not in the sense that and to the extent that it makes illegal that which was before lawful property. Congress cannot by its *ipse dixit* make innocence guilt or lawful property a public nuisance. My right to my property includes the manner in which I hold it—my title—the place in which it is located—the uses to which I can put it—and my right to its exclusive possession and enjoyment. Any law which prevents or seriously interferes with any one of these things to that extent deprives me of my property. It is only true in the sense that it is within the power of Congress regulating commerce to technically so declare and to itself technically fix and arrange and declare what

shall and what shall not be obstructions to navigation. But when Congress seeks to actually destroy a bridge and take it away, it cannot do so without offering the party owning the bridge a hearing, and if on the hearing it turns out that at the time when Corgress intervened the property as a fact was lawful property, whether erected under the state or the Federal Legislation, then Corgress must make compensation for the property so to be destroyed.

If that be true as to Congress, it is much more so as to the Secretary of War. The right of Congress to delegate to the Secretary of War its commercial power under the Constitution and make him the sole arbiter as to whether a bridge is or is not an obstruction to navigation, and as to whether it should or should not be removed is denied, and treated of elsewhere, but if for the sake of argument it be admitted that a general supervisory power may be delegated to the Secretary of War, it is submitted that the power to destroy private property could not be delegated to the Secretary of War, and that to say that the *ipse dixit* of the Secretray of War may be his technocal declaration that a bridge is an obstruction, deprive the Bridge Company of its property, and makes that which was before lawful property now unlawful and a nuisance, is in contradiction of the principles of justice as administered in our country. It makes the Secretary of War may by his technical declaration that a bridge tary of War both the judge and the jury. In a dispute between the Secretary of War and the Bridge Co. it makes the Secretary the sole arbiter in his own case. If the dispute be regarded as between the U. S. and the Bridge Co., then it makes the Secretary, who is the agent of the Government, again the sole power to determine.

Indeed under this statute the Secretary of War has no control over the alterations that must be made on the bridge.

The Act compels him to insert in his notice the results reached, not by the Secretary, but by the Chief of Engineers of the U. S. Army. It says:

> "In giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made."

The Chief of Engineers then (not the Secretary) orders us to tear down and destroy our present bridge and erect a new one at an expense of $459,000.

In the *Sinking Fund cases,* 99 U. S., p. 718, the Court said:

> "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. * * * The Fifth Amendment contains restrictions taken in substance from Magna Charta. Among them are the provisions that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. These are restrictions upon legislative as well as executive power. What is due process of law is well understood. *It is law in regular course of administration through courts of justice." Coke, 2 Inst.,* 272; *Murray's Lessee vs. The Hoboken Land & Improvement Co.,* 18 Howard, 272.
>
> "The terms, 'the law of the land,' said Chief Justice Ruffin (*Hoke vs. Harderson,* 4 Dev. (N. C.), 1), do not mean merely an act of the General Assembly.

If they did, every restriction upon legislative authority would be at once abrogated, and private property would be at the mercy of the legislature.' "

Again on p. 746, Mr. Justice Bradley said:

"It will not do to say that the violation of the contract by the law in question is not a taking of property. *In the first place, it is literally a taking of property. It compels the companies to pay over to the government, or its agents, money to which the government is not entitled.*"

On page 761, Mr. Justice Field said:

"The distinction between a judicial and a legislative act is well defined. The one *determines what the law is, and what the rights of parties are,* with reference to transactions already had; the other *prescribes* what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question *of right or obligation,* or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

Again on pages 765-766, it was said that, a law that destroyed private contracts or makes a man judge in his own case, or take his property away

* * * "Is against all reason and justice * * * for people to entrust a legislature with such powers, and therefore it cannot be presumed that they have done it. They may command what is right and prohibit what is wrong; *but they cannot change innocence into guilt,* or punish innocence as a crime, or *violate the right of an antecedent lawful private* contract, *or the right of private property.*"

Reference was made to Mr. Webster's argument in the Dartmouth College case wherein he said:

> "To justify the taking away of vested rights there must be a forfeiture, to adjudge upon and declare which is the proper province of the judiciary."

In Palairet's Appeal, 67 Pa. St., 486, the Court said:

> "It has become, then, a fundamental axiom of constitutional law, not only in this, but in every other state of this Union, *that the legislative power cannot, either directly or indirectly,* without the consent of the owner, take private property for merely private use, with or without compensation. In a case arising in Rhode Island, which, without a written constitution, except her charter of 15 Car. 11, which invested the General Assembly with power to make laws 'so as such laws, etc., be not contrary and repugnant unto, but as near as may be, agreeable to the laws of England, considering the nature and constitution of the place and people there,' Mr. Justice Story, delivering the opinion of the Supreme Court, held this language: 'In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice and without offense. Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island, as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people of that state subjected to its uncontrolled and arbitrary exercise. *That government can scarcely be deemed to be free, where the rights of property are left solely dependent*

upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.' He adds: 'We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any state in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced.' "

In the *Public Clearing House case vs. Coyne,* 194 U. S., 510, the right of the postmaster to temporarily keep mail was put upon the ground that it was not depriving any person of his property, although the court did in that case hold that due process of law is not denied when there was a temporary disposition of property by the order of the executive department.

Cooley's Constitutional Limitations, p. 434, he says:

"Due process of law in each particular case means such an exertion of the powers of Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

On the same page he again says:

"When the Government through its established agencies interferes with the titles to one's property, or with his independent enjoyment of it and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection, which have become established in our system of laws and not generally by rules that pertain to forms of procedure merely."

Again on page 435 discussing the interference by the legislative and the executive departments with property, he says:

> "In every government there is inherent authority to appropriate the property of the citizen for the necessities of the state, and constitutional provisions do not confer the power though they generally surround it with safeguards to prevent abuse. The restraints are that when specific property is taken a pecuniary compensation agreed upon, or determined by judicial inquiry, must be paid, and in other cases property can only be taken for the support of the Government, *and each citizen can only be required to contribute his proportion to that end.*"

In *Davison vs. New Orleans,* 96 U. S., 101, decided in 1877, this Court said:

> "The prohibition against depriving the citizens, or subject of his life, liberty or property without due process of law is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the constitution of the United States when it became a part of the fourteenth amendment in the year 1866. The equivalent of the phrase 'due process of law,' according to Lord Coke is found in the words 'the law of the land' in the Great Charter in connection with in the writ of habeas corpus, the trial by jury and other guarantees of the rights of the subject against the oppression of the Crown. * * * It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitution of the several states and of the United States.

> * * * A most exhaustive inquiry into the meaning of the words 'due process of law,' as found in the Fifth Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice or after the manner of such courts * * * "

The Court then says that it is remarkable that so few cases have arisen where it was claimed that the United States had deprived a person of his property without due process of law, and ended up the discussion by saying that a specific definition of the meaning of due process of law was impossible, or at least improbable, adding:

> " * * * There is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal constitution by the greater process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is after an experience of nearly a century still engaged in defining the obligations of contracts, the regulation of commerce, and other powers conferred on the Federal Government, or limitations imposed upon the states."

In a concurring opinion, Justice Bradley said:

> "The distress-warrant issued in the case of *Murray's Lessee et al. vs. Hoboken Land and Improvement Co.* (18 How., 272) was sustained, because it was in consonance with the usage of the English government and our State governments in collecting balances due from public accountants, and hence was 'due process of law.' But the court in that case expressly holds that 'it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the

executive and judicial, power of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. P. 276: I think, therefore, we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of lew;' but if found to be *arbitrary, oppressive* and *unjust*, it may be declared to be not 'due process of law.' "

SIXTH. THE QUESTION WHETHER THE UNION BRIDGE IS AN UNREASONABLE OBSTRUCTION TO NAVIGATION WHICH MAKES IT A NUISANCE, IS A JUDICIAL ONE WHICH ENTITLES THE BRIDGE COMPANY TO A HEARING ON THE MERITS BEFORE IT CAN BE DEPRIVED OF ITS LIFE.

In *Commonwealth vs. New Bedford Bridge Company*, 2 Gray, 339, an act of the legislature of Massachusetts incorporated a bridge company authorizing the building of a toll bridge across a navigable river and with suitable draws. Afterwards the legislature passed an act requiring the bridge company to make and maintain, in lieu of the then existing draw, a new draw 60 feet in width. The bridge company failed to comply with the act and were indicted for a nuisance. In holding that the bridge company was bound to enlarge its draws when necessary for the convenient accommodation of

vessels having occasion to navigate the river, the Supreme Court of Massachusetts held that the question whether the draws were suitable, was not to be determined by the legislature, nor by the corporation, but in the courts of justice and said:

> "The commonwealth has no more power or authority to construe the charter, than the corporation. By becoming a party to a contract with its citizens, the government divests itself of its sovereignty with respect to the terms, and conditions of the compact and its construction and interpretation, and stands in the same position as a private individual. If it were otherwise, the rights of parties contracting with the government would be held at the caprice of the sovereign, and exposed to all the risks arising from the corrupt or ill judged use of misguided power. The interpretation and construction of contracts, when drawn in question between the parties, belongs exclusively to the judicial department of the government. The legislature have no more power to construe their own contracts with their citizens, than those which the individuals make with each other. They can do neither without exercising judicial power which would be contrary to the elementary principles of our government, as set forth in the Declaration of Rights, art. 30. No better illustration of the dangerous consequences, which would follow from a different doctrine, could be had, that is afforded by the case at bar. If the legislature have the power to decide upon the true meaning of the terms of the contract, and to determine what shall be deemed suitable in the construction of the bridge and draws, there can be no limit placed upon the exercise of this power. If they have the right to prescribe a draw of sixty feet in width, they may hereafter require the defendants to extend it to one hundred feet, or to build it across the entire space between the shore and the adjacent island. So, too, in regard to the con-

struction of the bridge itself. The act of incorporation required that it should 'be well built, at least twenty-four feet wide, of good and suitable materials.' By parity of reasoning, it would be competent for the legislature to enact that the bridge should be rebuilt one hundred feet in width, and be constructed of iron. In a word, the argument leads directly to the conclusion, that the legislature have the power to annex new and onerous conditions to the contract, at their pleasure, and thus effectually destroy the value of the franchise granted to the defendants. Such a doctrine cannot be maintained without overthrowing all the salutary and well established principles applicable to this species of contract between the government and its citizens. For these reasons, we are of the opinion that the act of 1851, c. 318, *ex proprio vigore*, has no binding force upon the defendants, and that this indictment cannot be sustained against them upon proof of a neglect and refusal to comply with its requisitions."

In *Commonwealth vs. Pittsburgh & Connellsville R. Co.*, 58 Pa., 26, in an action of quo warranto brought by the Attorney General to have the charter of the railroad company declared void on the ground *inter alia*, that the legislature in the original grant had reserved the right in case the company should misuse or abuse any of its privileges, the legislature may resume the same, etc.; and thereafter the legislature did, by an Act of Assembly, declare that the rights granted had been abused and that they were revoked. The Supreme Court held that the legislature was not the final judge as to whether or not the charter had been abused or misused, but that that was a judicial question which must be decided by the courts. See opinion, page 46, *et seq.* See also to the same effect:

Mayor vs. Connellsville & S. P. R. Co., 4 American Law Register N. S., 750.

In *Fisher vs. McGirr*, 1 Gray 36, a statute of Massachusetts authorized a police officer to seize intoxicating liquors unlawfully in the possession of any person, and provided for their forfeiture by a proceeding before a magistrate. In holding the statute unconstitutional, in that it was violative of the requirement of due process of law, the Supreme Court of Massachusetts, per Shaw, C. J., said:

> "Such being the character of the prosecution, in a high degree penal in its operation and consequences; it should be surrounded with all the safeguards necessary to the security of the innocent, having the full benefit of the maxim, that every person shall be presumed innocent until his guilt be established by proof. He should have notice of the charge of guilty purpose, upon which his property is declared to be unlawfully held, and in danger of being forfeited, a time and opportunity to prepare his defense, an opportunity to meet the witnesses against him face to face, and the benefit of the legal presumption of innocence.
>
> "But there is another objection to the constitutionality of this law, of a more formidable character, and as it appears to us, quite decisive of the case. Supposing the owner of the liquor to have full notice, to have appeared before the magistrate, and to have had full opportunity to procure evidence and prepare for trial; *no provision is made by the statute for a trial*, for a determination by judicial proofs of the facts, upon the truth of which alone the property can be justly confiscated and destroyed. On the contrary, the statute expressly directs, that if the owner fail to appear, (that is, if he does appear,) unless he shall prove that the liquors were lawfully kept, they shall be declared forfeited, and the owner shall be adjudged to pay a fine and costs. There is no room for implication; the judgment shall pass for the forfeiture and fine, unless the owner can

prove that they were lawfully kept. This is the most favorable provision made for him. The judgment, then, passes without trial and without proof, unless that which preceded the seizure, and the seizure itself, are to be considered as legal proof."

* * * * * * *

"Now we can perceive no provision for the trial and proof of this offense of keeping liquors with illegal intent, in any sense in which a judicial trial is understood, in which a party charged with an offense, for which his property may be taken from him and confiscated, may stand on his defense, and have the presumption of innocence, until proofs are adduced against him to establish the crime or misdemeanor with which he is charged. Such a trial alone can satisfy the express provision in the Declaration of Rights, art. 12, which declares that no subject shall be arrested, or deprived of his property, immunities or privileges, or of his life, liberty or estate, but by the judgment of his peers, or the law of the land. These expressions have been understood, from Magna Charta to the present time, to mean a trial by jury, in a regular course of legal and judicial proceedings."

In *Colon vs. Lisk*, 153 N. Y., 188, the statute of New York under consideration made any interference by one person with oysters or other shell fish belonging to another a misdemeanor and added a penalty for each violation thereof, and further provided that certain officers might summarily seize some boat or vessel used in violation of the Act and authorize a justice of the peace, if after notice to the owner and hearing he should determine the vessel was used in violation of the statute, to order the same to be sold. No provision for trial by jury was found in any portion of the Act, nor was such a trial permissible under it. The Court of Appeals of New York held that the Act was unconstitutional in

that it deprived the owner of the vessel of trial by jury and of his property without due process of law, in violation of the provisions of the State and Federal Constitutions.

In *Bridge Co. vs. United States,* 105 U. S., 470, it appeared that Congress gave its consent to the erection of a bridge over the Ohio River between Cincinnati and Newport by the Newport and Cincinnati Bridge Company, a corporation organized and chartered under the laws of the States of Ohio and Kentucky, and authorized by both to construct a bridge, provided it was built in accordance with the laws of the United States, and Congress, by its resolution giving its consent, provided certain conditions under which the bridge might be constructed, and added this express reservation:

> "But Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall, at any time, be substantially and materially obstructed by any bridge to be erected under the authority of this resolution."

The Bridge Company began the erection of the bridge in accordance with this resolution of Congress and expended a large amount of money therein, but before it was completed Congress passed an act making other requirements as to its construction, involving a large additional expenditure of money. The Company complied with the latter act and completed the bridge on the altered plan and brought suit to recover the increased cost.

The Supreme Court, by a majority opinion, held that under the terms of the reservation, the Bridge Company took a grant *expressly made defeasible at will,* and, therefore, if modifications were afterwards directed by Congress, the assent was, in legal effect, withdrawn unless the required changes were made, and therefore the Bridge Company could not recover, and the Court held that, in view of the broad

terms of the reservation, the Bridge Company did not have the right to have a judicial ascertainment of the fact whether or not the bridge would, as originally built, substantially obstruct free navigation.

Mr. Chief Justice Waite, in delivering the majority opinion, said:

> "It is observed that the question now under consideration is, not whether the Bridge Company has failed to comply with the requirements of the joint resolution, but whether these requirements are all that the due protection of free navigation demands. *The first is, undoubtedly, a proper subject for judicial inquiry,* but the last, as we think, belongs to the Legislature."

Mr. Justice Field, in his dissenting opinion, said:

> "The General Government, through Congress, thus bound itself not to interfere with the construction of the bridge, nor with the bridge when completed, except on the contingency of its proving a material obstruction to the free navigation of the river. Such contingency had not occurred when the Act directing the alterations was passed; it has never occurred. So the proofs in the case show and, independently of this circumstance, *whether or not the contingency had occurred, was not a fact to be arbitrarily determined by the Legislature. It was to be ascertained judicially upon proofs and after hearing the parties, like any other disputed fact upon the establishment of which rights of property depend.*"

It thus appears that this Court in that case clearly recognized that the question whether or not a bridge fails to meet the requirement that it shall not unreasonably obstruct navigation, is a judicial question for the determination of a court and one which the Legislature could not determine.

and buildings, the enjoyment of water rights, the practice of many trades and occupations, and the business of manufacturing in particular localities, all fall, on some occasions in important respects within its sphere. To say to a man that he shall not use his property as he pleases under certain conditions, is to deprive him *pro tanto* of the enjoyment of such property. To find conclusively against him, that a state of facts exists with respect to the use of his property, or the pursuit of his business, which subjects him to the connation of the law, is to affect his rights in a vital point. The next thing to depriving a man of his property, is to circumbscribe him in its use, and the right to use property is as much under the protection of the law as the property itself, in any other respects, is, and the one interest can no more than the other be taken out of the hands of the ordinary tribunals. If a man's property cannot be taken away from him except upon trial by jury, or by the exercise of the right of eminent domain upon compensation made, neither can he, in any other mode, be limited in the use of it. The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the hands of the individual, is a common-law right, and is derived in every instance of its exercise, from the same source—that of necessity. It is akin to the right of destroying property for the public safety in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and *whether present or not,, must be submitted to a jury under the guidance of a court.* The finding of a sanitary committee, or of a municipal council, or of any other body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of a matter of this kind."

In *Chicago vs. Van Ingen*, 152 Ill. 634, it was held that a dock built under city's permission, could not be removed without compensation if not in fact an obstruction to navigation.

In *Teass vs. St. Albans*, 38 W. Va., 19, it was held that a municipal corporation could not, by its mere declaration that a dwelling house is a nuisance, subject it to removal; it must first resort to some proper *judicial* proceedings giving the owner or occupant an opportunity to be heard before his house is condemned and removed as a nuisance.

In *People vs. Yonkers*, 140 N. Y. (33 L. R. A. 481), where a Board of Health declared certain dams to be nuisances and ordered their abatement, the Court held that the decision of the Board of Health acting summarily that certain structures were a nuisance, was not final and conclusive upon the owners of the premises, but that the question was a judicial one which could be raised and determined in a judicial proceedings, needed to enforce the order of the Board of Health or in an action brought by the owners of said property against the public officers, who might abate said nuisance.

Cooley on Constitutional Limitations, 6th Ed., in a note, p. 741, says:

> "Whether any particular thing or act is or is not permitted by the law of the state, must always be ajudicial question, and therefore, the question of what is and what is not a public nuisance, must be judicial, and it is not competent to delegate it to the local legislature or administrative boards."

In *Yates vs. Milwaukee*, 10 Wall. 497, where a bill was filed to restrain the City of Milwaukee from interfering with

nuisance by complainant, who claimed to be specially injured thereby. The Supreme Court said:

> "In the next place: is the bridge west of the Illinois boundary an unreasonable obstruction and, therefore, a nuisance that a court of chancery can lawfully remove? In considering this question we must be governed by the same rule on which a court of law could proceed in case of an indictment against the Bridge Company for committing the nuisance; and the rule is that if the abridgement of the right of passage occasioned by the erection was for a public purpose and produced a public benefit, and if the erection was in a reasonable situation, and a reasonable space was left for the passage of vessels on the river, then it is not an unreasonable obstruction and indictable. *King vs. Russell,* 6 Barn & C., 566; *Penn vs. Wheeling Bridge Co.,* 13 How., 623; *People vs. Sar. & R. R. Co.,* 15 Wend. 133.
>
> "Then, again, the obstruction to navigation must be plainly a nuisance within this rule before it can be removed by decree. If the proceeding was by indictment, and the jury doubted whether the obstruction was a nuisance or not, they would be instructed to acquit the defendant; and so, if this case was referred to a jury to try the fact and they doubted, they would be bound to acquit. And the same rule applies in a court of chancery where the court ascertains the fact of nuisance. *2 Story, Com. on Eq.,* 203, 204."

And the court also said:

> "The character of the nuisance and the sufficiency of the damage sustained is to be judged by the courts. *Iveson vs. Moore,* Ld. Raym., 486; *1 Salk.,* 15; *Gibbons on Dilapidation,* 403."

In *Chicago, Milwaukee & St. Paul R. Co. vs. State of Minnesota,* 134 U. S. 418, it appeared that a statute of Min-

nesota allowed a railroad commission to establish rates for a railroad transportation, which were declared to be final. In reversing a judgment of the Supreme Court of Minnesota awarding a mandamus to compel the Railroad Company to comply with the order of the state railroad commission, the Supreme Court *held* that the statute deprived the Company of its right to a judicial investigation by due process of law and substituted therefor, as an absolute finality, the action of a railroad commission which was not clothed with judicial functions and does not possess the machinery of a court of justice; and that the question of the reasonableness of a rate of charge by a railroad company for transportation was eminently a question for judicial investigation, requiring due process of law for its determination; and if the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of a judicial investigation, it is deprived of the use of its property, and, in effect, of the property itself, without due process of law and in violation of the Constitution of the United States.

In *Reagan vs. Farmers Loan & Trust Co.*, 154 U. S. 363, it was *held* that although the formation of a tariff of charges for transportation by a common carrier is a legislative or ministerial, rather than a judicial, function, it is a judicial question whether or not such rates are unjust and unreasonable and such as to work a practical destruction to rights of property; and that the fixing and enforcement by a state railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstitutional denial of the equal protection of the laws. It appeared in that case that the Statute of Texas, under consideration, provided that the rates established by the commission were conclusive and penalties were imposed on the railroad corporations for any violation of the provisions of the act. In view of the fact that

the railroad companies had equitable relief in the Federal Courts by an injunction to prevent the enforcement of the penalties, the Supreme Court, although it assumed that the provisions in question were void because involving a denial to the railroad companies of the right of a judicial inquiry into the reasonableness of the rates prescribed, did not find it necessary to specifically decide the question.

The Court, in its opinion by Mr. Justice Brewer, said:

"These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all

their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

See also:

Covington & Lexington Turnpike Co. vs. Samford, 164 U. S. 578.

In *Smyth vs. Ames,* 169 U. S. 466, after reviewing previous cases, the Supreme Court, in its unanimous opinion delivered by Mr. Justice Harlin, said that it must be regarded as settled that

> "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

In *Lake Shore & M. S. R. Co. vs. Smith,* 173 U. S. 688, the Supreme Court by Mr. Justice Peckham, said:

> "A railroad company, although a *quasi* public corporation, and although it operates a public highway (*Cherokee Nation vs. Southern Kansas Railway Company,* 135 U. S. 641; *Lake Shore & M. S. Railway Co. vs. Ohio,* 173 U. S. 285, 301), has nevertheless rights which the legislature cannot take away without a violation of the Federal Constitution, as stated in *Smyth vs. Ames* (169 U. S. 466, 544). * * * Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property."

The case of *Miller vs. Mayor, etc., of New York*, 109 U. S. 385, does not establish a contrary doctrine. In that case, one, Miller, filed a bill to restrain the erection of the so-called Brooklyn bridge over the East River on the ground that it would be a private nuisance, in that it would obstruct his navigation of the river. The Court below found there was no special or peculiar injury to the plaintiff and dismissed the bill. The Supreme Court held that the question of the conditions under which bridges might be erected over navigable streams was a legislative one, and, it appearing that this structure was being erected in accordance with the Act of Congress, it was a lawful structure and not a public nuisance. That case cannot, in any aspect of it, be constructed as authority for the proposition that Congress may delegate to the Secretary of War the power to determine whether or not a bridge already constructed, under legislative power, is a nuisance.

In *Deming vs. City of Cleveland*, 22 Ohio Cir. Ct. Rep. 11, it was held that an act authorizing the City to divert or change the course of any stream within the city which should be found by the city to be dangerous and a menace to public health, is violative of the constitutional requirements as to due process of law, in that it makes no provisions for compensation in riparian proprietors, or for trial by jury or otherwise in declaring such streams a nuisance; the Circuit Court said:

> "Neither the legislature nor the city council of the city can make a stream of water a nuisance by declaring it so. Its character in that regard can only be established by legal proceedings. In other words, a city cannot arbitrarily by ordinance, declare property a nuisance and destroy it, unless it is in fact a nuisance. When it is in fact not a nuisance, no authority to remove it is derived from the order declaring it to be such. * * * * * Whether the thing complained of be or be not a nuisance, is a question of fact, and, if the rights of private

property are involved in the question, the person complained of is entitled to a trial in a competent tribunal of that question before he can be deprived of his property. * * * The statute under which this property right of the plaintiffs in this stream is sought to be taken, makes no provision for compensation, no trial by jury or otherwise is provided for, hence it cannot be said that this is a taking by due process of law, and for this reason the act is a clear violation of article 1, section 19, of the constitution.

Whether any particular act or thing is not permitted by the law of the state, must always be a judicial question, and, therefore, the question what is and what is not a public nuisance, must be judicial; and it is not competent to delegate it to the local legislature or administrative boards. *Yates vs. Milwaukee, supra; Redford vs. People,* 14 Mich. 41; *State vs. Street Com.,* 36 N. J. 263; *Everett vs. Council Bluffs,* 45 Iowa, 66; *Hutton vs. Camden, supra; St. Louis vs. Schnuchelberg,* 7 Mo. App. 536.

The local declaration that a nuisance exists is, therefore, not conclusive, and the party concerned may contest the fact in court. *Ex parte O'Leary,* 65 Miss. 80; *Hennesy vs. St. Paul,* 37 Fed. Red. 563; *Arkadelphia vs. Clark,* 52 Ark. 23; *Janesville vs. Carpenter,* 77 Wis. 28; s. c. 20 Am. Rep. 123."

In *Health Department of the State of New York vs. Rector of Trinity Church,* 145 N. Y. 32, in holding to be constitutional an act of the State of New York, authorizing the board of health to require each floor of every tenement house to be furnished with water, Mr. Justice Peckham, in delivering the opinion of the Court, said:

In *People vs. Yonkers,* 140 N. Y., 1, the statutes of the State of New York, comprising the charter of the City of Yonkers conferring powers on the Board of Health of the City to abate nuisances, came before the court for consideration. The statutes authorized the Board of Health to abate nuisances detrimental to public health and to enforce observances of its regulations by penalties and by action to recover the same, and the violation of its order was also made a misdemeanor. Complaint was made to the Board that certain dams in the Nepperhan River created nuisances, and, after notice to the owners of the dams and after hearing evidence, the Board determined that the dams were nuisances and ordered them removed. In holding that the determination of the Board of Health was not in violation of due process of law, because the property owner had a remedy in equity to restrain the destruction of his property or a common law action against all persons engaged in the abatement of the nuisance to recover his damages if he can show that the alleged nuisance does not in fact exist, and might recover judgment notwithstanding the decision of the Board of Health, the Court of Appeals of New York said:

> "The question may be asked, How can these provisions conferring powers upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the constitution, securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that *they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of nuisances final and conclusive upon the owners of the premises where they are alleged to exist. Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the party proceeded against must have a hearing, not as a matter of favor,*

but as matter of right; and the right to a hearing must be found in the acts. Stuart vs. Palmer, 74 N. Y. 183, 30 Am. Rep. 289. As we have said, there is no provision of law giving any party a right to a judicial hearing before these boards, and ther is no provision making their determination final. If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions. Boards of health, under the acts referred to, cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance unless there be in fact a nuisance."

To the same effect:

Stone vs. Heath, 179 Mass. 385.

In *Cooley's Constitutional Limitations* (5th Ed.), at page 722, in a note, the learned author, speaking of boards of health, says:

"Though they cannot be vested with authority to decide finally upon one's right to property, where they proceed to interfere with it as constituting a danger to health, yet they are vested with *quasi* judicial power to decide upon what constitutes a nuisance, and all presumptions favor their actions." And again, at page 742, in a note, citing authorities, he says: "Whether any particular thing or act is or is not permitted by the law of the state must always be a judicial question, and therefore the question what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to local legislative or administrative boards. The

local declaration that a nuisance exists is, therefore, not conclusive, and the party concerned may contest the facts in the Courts."

Dillon, in his work on *Municipal Corporations,* (4th ed.) Par. 374, says the authority to prevent and abate nuisances and its summary exercise "may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal nature of a nuisance, but such power conferred in general terms cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which in its nature, situation, or use is not such."

In *Wood's Law of Nuisances* (sec. 740), it is said that, where the public authorities abate a nuisance under authority of a city ordinance, "they are subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance. * * * It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare by ordinance or otherwise anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw, without being responsible for all the consequences; and, even if such power is expressly given by the legislature, it is utterly imperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it."

Tiedeman on State and Federal Control of Persons and Property, Vol. 2, section 146, says:

"The legislative prohibition or regulation of the use and enjoyment of one's private property in land is in violation of constitutional principles, when it is not confined to the prevention of a nuisance. A certain use of lands, harmless in itself, does not become a nuisance,

because the legislature has declared it to be so. The legislature can determine whether it will permit or prohibit the doing of a thing which is harmful to others, in the proper consideration of the public welfare; but it cannot prohibit as a nuisance an act which inflicts no injury upon the health or property of others. If the harmful or innocent character of the prohibited use of lands furnishes the test for determining the constitutionality of the legislative prohibition, *it is clearly a judicial question,* and is certainly not within the legislative discretion, whether the prohibited act or acts work an injury to others. If they do not cause injury or annoyance to others, the attempted legislative interference is unwarranted by the constitution, and it is the duty of the courts to declare it to be unconstitutional."

In *Hutton vs. City of Camden,* 39 N. J. 122, the Supreme Court of New Jersey said:

"Assuming the power in this board (of health) derived from the legislative, to adjudge the fact of the existence of a nuisance, and also assuming such jurisdiction to have been regularly exercised, and upon notice to the parties interested, still, I think, it is obvious that, in a case such as that before the Court, the finding of the sanitary board cannot operate, in any respect, as a judgment at law would, upon the rights involved, as will require but little reflection to satisfy any mind, accustomed to judge by legal standards, of the truth of this remark. To fully estimate the character and extent of the power claimed, will conduct us to its instant rejection. The authority to decide when a nuisance exists, is an authority to find facts, to estimate their force, and to apply rules of law to the case thus made. This is a judicial function, and it is a function applicable to a numerous class of important interests. The use of land

the plaintiff's wharf, which had been declared an obstruction to navigation and a nuisance by the City, the Supreme Court of the United States said:

> "The Act of the Wisconsin Legislature, approved March 31, 1854, confers upon the City of Milwaukee authority to establish dock and wharf lines on the banks of the Milwaukee and Menomonee Rivers, and restrains and prevent encroachments upon said rivers and obstructions thereto, and it is by this statute that the summary proceedings for the removal of appellant's wharf are supposed to be authorized. But the mere declaration by the City Council of Milwaukee, that a certain structure was an encroachment or obstruction, did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the City or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the City itself. This would place every house, every business, and all property of the City, at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defended this case in the Circuit Court; for that single ordinance of the City, declaring the wharf of Yates a nuisance, and ordering its abatement, is the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public."

Wood on the Law of Nuisances, (3rd edition), section 22, says:

> "As to what constitutes a nuisance, as well as the question of conveniences, are questions to be determined

by the Court; not by the jury. Also, whether the facts, if proved, in a given case, under all the circumstances, produce such results as amount to a nuisance; but whether the results are so given as to amount to a public nuisance is a question for the jury."

And also, in treating of obstructions in public highways as nuisances, he says (p. 1009):

"As to what is an obstruction is a mixed question of law and fact. It is for the jury, under proper instructions from the Court, to say whether an obstruction actually exists; but what amounts to an obstruction within the legal definition of the term is for the Court."

See also, p. 301.

He further says (p. 393):

"As to what constitutes a defect is, in many instances, a mixed question of law and fact, depending upon a variety of conditions that vary with the circumstances of each case and which come within the province of a jury and are proper instructions from the Court."

In speaking of obstructions of navigable streams as nuisances, he says (p. 673):

"The question of nuisance arising from an authorized obstruction is always a question of fact, to be determined by the jury in each case, under proper instructions from the Court; and no distinct rule can be given by each to determine whether or not an obstruction in a given case is a material obstruction. This must necessarily depend upon a variety of questions."

In *Mississippi & Missouri R. R. Co. vs. Ward*, 2 Black 485, a bill in equity was filed praying for an abatement of the Rock Island bridge over the Mississippi River as a public

been collected by regular judicial proceedings in a court of justice. The necessities of government, the nature of the duty to be performed and the customary usage of the people have established a different procedure, which, in regard to that matter, is and always has been due process of law."

A warrant for the collection of taxes, authorized in the sale of property thereon, is and always has been considered due process of law.

Springer vs. United States, 102 U. S. 586.

In the levy and collection of taxes, due process of law does not imply the right to such notices of hearing as are essential to the validity of the proceedings and judgments of judicial tribunals.

McMillen vs. Anderson, 95 U. S. 37.

Cincinnati, N. O. & T. P. R. R. Co., 115 U. S. 321.

In *Davidson vs. New Orleans*, 96 U. S. 104 (24: 619), it was held by this Court, Mr. Justice Miller delivering the opinion,

"that whenever, by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, *and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice*, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. * * * It is not possible to hold that a party has, without due process

> of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, *a fair trial in a court of justice*, according to the modes of proceeding applicable to such a case."

In *Lent vs. Tillson*, 140 U. S. 316, it was held that a State statute, authorizing the assessment and collection of a tax, for the widening of a street, which provides for due notice to all persons interested and a proper mode of contesting the tax in a court, does not deprive persons of property without due process of law.

In *Hovey vs. Elliott*, 167 U. S. 409, in holding that due process of law signifies a right to be heard in one's defense, in an elaborate and exhaustive opinion delivered by Mr. Justice White, the Supreme Court said:

> "To say that Courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever, is, in the very nature of things, to convert the Court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. * * *
>
> "And quoting with approval this language, in *Windsor vs. McVeigh*, 93 U. S. 277 (23: 916), the Court, speaking through Mr. Justice Field, again said (pp. 277, 278 (915, 916):
>
> 'The principle state in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, where he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving

him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the Court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear an dspeak, if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence.'

"This language but expresses the most elementary conception of the judicial function. At common law, no man was condemned without being afforded opportunity to be heard. Thus, Coke (2 Inst. 46), in commenting on the 29th chapter of Magna Charta, says: 'No man shall be disseised, etc., unless it be by the lawful judgment; that is, verdict of his equals (that is, of men of his own condition), or by the law of the land (that is, to speak it once for all), by the due course and process of law.'"

See question considered and cases cited in Patterson, U. S. Constitution, Sec. 112, at note:

The words of the act under which these proceedings were had are as follows:

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable water ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so as to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time, the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be

"This is not the case of a proceeding against an individual on the ground of the maintenance of a nuisance by him, nor is it the case of an assumed right to destroy an alleged nuisance without any other proof than the decision of the board itself (with or without a hearing) that the thing condemned with a nuisance. Nor is it the case of the destruction of property which is in fact a nuisance, without compensation. *Where property of an individual is to be condemned and abated as a nuisance, it must be that somewhere between the institution of the proceedings and the final result the owner shall be heard in the courts upon that question, or else that he shall have an opportunity, when calling upon those persons who destroyed his property to account for the same, to show that the alleged nuisance was not one in fact. No decision of a board of health, even if made on a hearing, can conclude the owner upon the question of nuisance. People vs. Yonkers Board of Health,* 140 N. Y. 1, 23 L. R. A. 181; *Yonkers Board of Health vs. Copcut* 140 N. Y. 12, 23 L. R. A. 485; *Miller vs. Horton,* 152 Mass. 540, 10 L. R. A. 116; *Hutton vs. Camden,* 39 N. J. L. 122, 23 Am. Rep. 203."

In *United States vs. Rider,* 50 Fed. 406, the precise question arose in the District Court for the Southern District of Ohio in a prosecution under the fourth and fifth sections of the River and Harbor Act of 1890, and that the Court held the Act unconstitutional, and said:

"The main question, and that which goes to the root of the matter, is whether congress has the power to confer upon the Secretary of War the authority attempted to be conferred by the act. In accordance with its terms, whenever he has good reason to believe that a bridge is an unreasonable obstruction to navigation, he is to give notice to the parties owning or controlling the same—after first giving them reasonable opportunity to be

heard—to make such alterations as he may specify, and, upon their failure or refusal to make the same within a reasonable time, they are to be deemed guilty of a misdemeanor, and the Secretary may direct the institution of criminal proceedings. The power of the Secretary depends upon his having adjudged that the bridge is an obstruction, and his adjudication is made final and conclusive. This is a judicial power. The question is one of fact, or a mixed question of law and fact, and it cannot be determined by a Court without a jury unless the defendant consent. It was held in *Grant vs. Raymond,* 6 Pet. 242, Chief Justice Marshall announcing the decision, that the Secretary of State of the United States is not an officer in whom, under the constitution, judicial power can be vested. In that case the Secretary had gone through with the form of reissuing a patent for an invention. It is true that there was not then any statute authorizing a reissue. The original patent had been granted by the President, signed by him, and countersigned by the Secretary. It was returned to the patent office, and canceled, owing to the defective specification. The argument in favor of the reissue was that the department of state had clearly the right to correct an inadvertent or innocent mistake. But the Court said that the question of indavertence or mistake was a judicial question, which could not be decided by the Secretary of State."

* * * * * *

"But there is this radical difference between the case of a reissued patent and the case now before the court: The patent, original or reissued ,is only *prima facie* evidence of an exclusive right in the patentee, and it is open to all defenses, including, in the case of a reissued patent, those involving an investigation into the question whether there was in fact any such inadvertence, accident or mis-

take as was requisite to authorize the reissue; while here the Secretary of War finds and decides conclusively and finally whether the bridge is an obstruction, what changes shall be made, and within what time; and the only questions left open to be tried in the criminal prosecution for misdemeanor, which he is authorized to set on foot, are whether he has made the findings and decision, ordered the changes, given the proper notices, and whether the defendants have complied with his orders.

"In this case the bridge was built in 1874 by the board of commissioners of Muskingum county by virtue of a grant from the state of Ohio under the act of the Legislature of March 25, 1870. The Muskingum river is entirely within the state of Ohio. Since 1838, and until the date hereinafter mentioned, it has been under the control of the state, through its board of public works, which mantained a system of slack-water navigation until the cession of the river and its improvements by the state of Ohio to the Federal Government, March 21, 1887. Since that time the general government has caused to be constructed in a dam at the head of rapids above said bridge, on its west side and under the bridge, an artificial channel. It has also raised the locks and dam on the river below, thus raising the level of the water above, some four feet. These improvements and changes furnished the occasion alleged for requiring the proposed changes in the bridge. The right of the state of Ohio to erect or authorize bridges over the river which should not interfere with its navigation is conceded, and that such bridges were lawful structures. But it is urged for the government that they were built subject to the power of congress at any time to act upon the subject of the navigation of the river, and to define what structures should be regarded as interfering with that navigation; citing *Gilman vs. Philadelphia*, 3 Wall. 731. There is a long

series of cases decided by the Supreme Court, and cited in *U. S. vs. Keokuk & H. Bridge Co.*, 45 Fed. Rep., at page 180, sustaining the general proposition as above stated. But the question to be here decided is whether Congress could delegate, as it has undertaken to do, its authority in the premises to the Secretary of War. My conclusion is that it could not. The reasons for this conclusion are so well and so fully set forth by Judge Shiras in *U. S. vs. Keokuk & H. Bridge Co.*, cited above, that it is sufficient to refer to that case, and to express, as I do, my concurrence in the reasoning and conclusions of the opinion therein."

A writ of error having brought the case into the Supreme Court, the Court found it unnecessary to decide the constitutional questions raised, but held that assuming the act to be constitutional the defendants could not be held guilty, because it appeared that they did not have sufficient public moneys in their hands which they could use in altering the bridge. The Supreme Court, in its opinion (see *Rider vs. United States*, 178 U. S. 251), respecting the constitutional questions raised on the record, said:

"These are questions of very considerable importance, but in the view we have taken of the case, their determination is not now necessary."

In *Baldwin vs. Smith*, 82 Ill. 162, it was held that an ordinance of a town was invalid which authorized the authorities of a town to close a liquor saloon or grocery store by force, and take and hold possession of the same without having it first judicially declared t be a nuisance and ordered to be abated, the Court said:

"The town council had no more power to authorize the town constable to do the act which he admits he did do, than to authorize him to imprison the supposed of-

fender, at his discretion. The investigation by the town council amounts to nothing, as that was not a judicial tribunal, empowered to make such investigations, and condemn and punish. Such proceedings as we find in this record are violative of the elementary principles of our constitution and laws, which give to any man the right of trial by a jury, and in a Court of competent jurisdiction. His guilt can not be inquired into by a town council, and their decree enforced by a town constable, with impunity. The party charged with a violation of the ordinance had a right to be heard in court, and to receive its judgment."

To the same effect:

Darst vs. People, 51 Ill. 286.

In *American School of Magnetic Healing vs. McAnulty*, 187 U. S. 94, a bill was filed to restrain the Postmaster General having issued a "fraud order" under the authority of Congress excluding such letters from the mail; and the bill challenged the constitutionality of the Acts of Congress delegating power to the Postmaster General to solely and exclusively determine and pass upon the rights of the complainants in the premises on the ground that it was in violation of the fourth, fifth and fourteenth Amendments to the Constitution of the United States.

The Court below sustained a demurrer to the bill, which judgment was reversed by the Supreme Court, but the latter Court expressly stated that it did not decide or express any opinion upon the various constitutional objections set out in the bill, but simply held that the admitted facts showed no violation of the statutes of Congress relied upon.

The Supreme Court, after citing certain cases relative to the administration of the public land system, said:

> "While the analogy between the above cited cases and the one now before us is not perfect, yet even in them it is held that the decisions of the officers of the department upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a *legal question* by department officers."

See also:

Inter-State Commerce vs. Brimson, 154 U. S., 449.

In that case it was directly held that Congress could not pass an act to regulate commerce and thereby impair those fundamental guarantees of personal rights that are recognized by the Constitution as entering in the freedom of the citizen.

SEVENTH. SECTION 18, OF THE ACT OF MARCH 3, 1899, UNDER WHICH THESE PROCCEDINGS, DOES NOT PROVIDE FOR "DUE PROCESS OF LAW."

The term "due process of law" means a course of legal proceedings according to those rules and proceedings which have been established by our jurisprudence for the protection and enforcement of public rights.

Kennard vs. Louisiana, 92 U. S. 480.
Pennoyer vs. Neff, 95 U. S. 714.

In *Hager vs. Reclamation District,* 111 U. S. 701, the Supreme Court, in its unanimous opinion, delivered by Justice Field, said:

"It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In *Ex Parte Wall,* 107 U. S. 265, Mr. Justice Bradley, in delivering the opinion of the Supreme Court, said:

"In all cases, that kind of procedure is due process of law, which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society." ' "

In *Den vs. Hoboken Land & Improvement Co.,* 18 Howard 272, the Supreme Court, in its unanimous opinion by Justice Curtis, said:

"That the warrant now in question is legal process, is not denied. It was issued in conformity with an Act of Congress. 'But is it due process of law?' The

Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

* * * * * *

"For, though 'due process of law' generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst., 47, 50; *Hoke vs. Henderson*, 4 Dev. N. C., 15; *Taylor vs. Porter*, 4 Hill, 146; *Van Zandt vs. Waddell*, 2 Yerger, 260, 599; *State Bank vs. Cooper*, Ibid, 599; *Jones' Heirs vs. Perry*, 10 Yerg., 59; *Greene vs. Briggs*, 1 Curtis), yet, this is not universally true. There may be, and we have seen that there are cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debt-

ors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with those proceedings."

In *United States vs. Lee,* 106 U. S. 196, an action of ejectment was brought against certain officers and agents of the United States to recover certain lands used as a military station and national cemetery. The title relied on by defendants was a tax sale certificate made by the commissioners appointed under the Act of Congress for the collection of direct taxes in the insurrectonary districts within the United States. The land having been bid in by the commissioners of the United States, the certificate was impeached because of the refusal of the commissioners to permit the owner to pay the taxes in any other way than by payment in person. A judgment for the plaintiff was affirmed by the Supreme Court which, in its opinion per Miller, Jr., after referring to the fifth amendment to the Constitution, said:

> "These provisions for the security of rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the Government. See *Ex Parte Milligan,* 4 Wall., 2 (71 U. S. XVIII., 281), and the case of *Kilbourn,* discharged from the custody of the Sergeant-at-Arms of the House of Representatives by Chief Justice Carter. *Kilbourn vs. Thompson,* 103 U. S., 168 (XXVI., 377).

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

"It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this Court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

In *Kelly vs. City of Pittsburgh*, 104 U. S. 78, the Supreme Court said:

"Taxes have not, as a general rule, in this country since its independence, nor in England before that time,

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNION BRIDGE COMPANY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES, DEFENDANT IN ERROR. } No. 431.

MOTION TO ADVANCE.

This case is before this court on a writ of error from the United States District Court for the Western District of Pennsylvania.

Proceedings were instituted by the United States against the Union Bridge Company, by information, to recover the penalties provided in section 18 of the river and harbor act of March 3, 1899, for failure to alter a bridge which the company maintains over the Allegheny River just above its junction with the Monongahela at Pittsburg, Pa. The Secretary of War on January 20, 1903, made an order, as authorized by the act referred to, directing the Union Bridge Company to alter its bridge so as to render navigation under it reasonably free, easy, and unobstructed.

Under the terms of this order the alterations were to be completed on or before July 26, 1904.

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The Bridge Company having applied for a rehearing, the Secretary of War, on July 24, 1904, and on subsequent dates, extended the period for completing the alterations, the last written extension being January 1, 1905. On June 21, 1905, the Secretary of War formally denied the company's application for a rehearing. The Bridge Company having failed to comply with the Secretary's order, the Government instituted criminal proceedings. The case came on for trial in January, 1906, and resulted in a verdict for the Government. From the decision of the District Court the defendant has sued out this writ of error.

The principal questions presented by the record are as follows: First. Had Congress a right to determine what is an unreasonable obstruction to the navigation of an interstate river? Second. Could Congress delegate such power to the Secretary of War? Third. Is the act of Congress in question unconstitutional because it provides no compensation to the bridge company to cover the cost of such changes? These questions arise in other similar cases where the removal of obstructions to the navigation of interstate streams has been undertaken, a number of which are now pending and undetermined.

The bridge in question seriously interferes with and impedes navigation on the Allegheny River. The case, therefore, is one of very great commercial interest and importance, as it affects not

only the parties to the record but all persons interested in traffic on the Allegheny River which must pass the bridge; and, for this reason, it is apparent that it presses for determination.

Therefore the Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on some day convenient to the court during the present term.

Notice of this motion has been served upon opposing counsel.

HENRY M. HOYT,
Solicitor-General.

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deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed. Provided, that in any case arising under the provisions in this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

We beg to call the attention of the Court to the following features of this legislation:

First. It comprehends every railroad, or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States. Not one is excepted.

Second. Not one dollar of compensation in any manner or form is provided for, or allowed to the persons or corporations owning any such bridge.

Third. The finding of the Secretary of War is conclusive, and after such finding failure to remove, or to comply with the lawful order of the Secretary of War, upon conviction thereof, upon indictment, results in heavy punishment. We say the order of the Secretary of War is conclusive, under the act, for the reason that no review of his finding is provided for in any manner whatever, but the conviction of a misdemeanor is inevitable upon proof of failure to remove the bridge, or to comply with the lawful order of the Secretary of War. From such conviction only, is an appeal

given, which could only raise the question as to the regularity of the criminal proceedings, or the sufficiency of the proof of guilt, because, assuming the act to be valid, (and the act surely does not mean to question its own validity) the order of the Secretary of War must be "lawful," (within the meaning of the act) if made, in accordance with the proceedings, directed by the act.

FOURTH. The act expressly provides for a pre-judgment of the case before any of the proceedings directed by it can be had, and it expressly directs that the final conclusion or ending of the process, shall be in accordance with such pre-judgment. The proceeding is, therefore, not judicial, but merely a means to cloak a pre-determined conclusion, secretly arrived at by means unknown to the owner of the bridge.

This is perfectly obvious from the plain language of the Act:-

> "That whenever the Secretary of War shall have good reason to believe that, etc. * * * it shall be the duty of the said Secretary first, giving the parties reasonable opportunity to be heard, to give notice to the persons or corporation owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed."

The Secretary of War is, therefore, expressly enjoined not to act at all until "he shall have good reason to believe;" that is to say, of course, that he believes, because being ordinarily a sane man, he would certainly believe whatever he had a good reason to believe. So, the injunction of the act is that before he does anything, he be charged with a fixed belief, based upon a good reason.

Having such fixed belief, as the prime qualification for the discharge of his duty, he shall then

> "First giving the parties reasonable opportunity to be heard, give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed."

Coming to the requirement to give the parties reasonable opportunity to be heard, raises, at first, a hope, or expectation that some kind of a judicial inquiry is to be made, and a decision to be reached only after, and upon such inquiry; but no.—All hope or expectation is utterly blasted by the next following clause requiring absolutely of the Secretary, that after such hearing of the party owning the bridge, "to give notice to the persons or corporations owning or controlling such bridge *so to alter the same.*" The hearing provided for must be then only for the purpose of justifying the fixed belief, with which the Secretary is required to start out, and not for the purpose of upsetting it, because after such hearing, the act expressly makes it his duty to find against the owner of the bridge, and to require the same to be altered; and the changes, recommended by the Chief of Engineers, *without any provision for hearing or notice to anybody*, shall be required to be made.

Fifth. Having so acquired his belief, without notice to the bridge owner, and from suggestions and by means that the bridge owner can never find out, the act, after thus carefully requiring the Secretary to be primed and cocked, ready to go off, then directs him to give notice that he is so ready, and, after a hearing upon such notice, peremptorily requires him to order the bridge down, or altered.

SIXTH. Such hearing as is provided for is to be had without the power to compel the attendance of witnesses, or the giving of testimony; and, such witnesses as may voluntarily appear, can only make statements without the sanction of an oath, and free from the pains and penalties of perjury. This, perhaps, is an immaterial ommission, as the Act itself dictates beforehand, the only judgment the Secretary can render upon such hearing.

Under the Act of Congress in question, Congress has delegated to the Secretary of War, not only the judicial function of determining whether or not bridges now constructed are unreasonable obstructions to navigation, but has delegated to the Chief of Engineers the power to determine what changes shall be made in any bridge which may be condemned by the Secretary of War, and has provided that the failure to comply with the notice of the Secretary of War, specifying the changes required to be made, shall be a crime, and this delegation was made without enacting any general rule to guide or control these officers in determining the changes which shall be made in the bridge, as to height, width of span, or otherwise. In other words, Congress has merely enacted the general principle of law, previously declared by the Courts, that any unreasonable obstructions to the free navigation of rivers is a nuisance, and, without determining in any way any of the essential elements as to the conditions under which bridges may be constructed over navigable rivers, it has delegated to the Chief of Engineers the power to legislate on the subject in each particular case according to his unrestrained discretion, and the failure to comply with the law which he may enact is made a crime. It is not doubted that administrative officers may make rules and regulations to carry out what Congress has expressly declared to be the law, but Congress cannot authorize any other branch of the government, or any subordinate officer therein, to define that which is purely

legislative; and that is purely legislative which defines what shall be the height, width or span, or otherwise, of a lawful bridge over a navigable stream, and makes the failure to comply with that determination a crime.

In this case, the Chief Engineer has enacted the law governing this case and has designated the crime for which the plaintiff in error is convicted. The thing prohibited, the thing for which the Bridge Company is to be punished, the act which is the offense, is prescribed by the Chief of Engineers and not enacted by Congress. Congress has promulgated no general rule or basis, in the nature of legislation, governing the case in question. It is not the case of an administrative officer applying a law of Congress, wherein the general rule governing all cases is prescribed, but an administrative officer himself determines what the law is.

SEVENTH. If the Act of 1899 is properly construed by the Court below, Congress sought by that Act to use the judicial power of the Government merely and solely for the purpose of enforcing a decree or decision arrived at by the Legislative Departments of the Government, and without giving to the courts the power to investigate the facts and determine the merits of the controversy as between the Secretary of War representing the United States on the one hand, and the Union Bridge Company as defendant on the other. This it is beyond the power of Congress to do, as it would compel the courts to perform duties that were not judicial.

The Courts of the United States are given jurisdiction over *cases* and *controversies* as to different things, but they are only given jurisdiction in favor of the United States itself. (Section 2, Article 3 of the Federal Constitution):

> "To controversies to which the United States shall be a party."

It must be a controversy then of which the courts can take jurisdiction, and it must be a controversy in which the courts examine on the merits and determine the dispute in accordance with the settled principles of law.

As ruled by the Court below, there was no controversy whatever in this case, except that the Union Bridge Company had not obeyed the order of the Secretary of War, and the Court held that there was no question of fact in the case whatever. The sole and only question in the Court below was, had the defendant obeyed the order of the Secretary of War. If he had not, then he was necessarily guilty.

This is not believed to be a controversy or case which Congress could impose upon the courts.

Interstate Commerce Commission vs. Brimson, 154 U. S.
Hayburn's Case, 2d Dallas, 409.
United States vs. Feireira, 13 How., 40.
Todd's Case, 13 How., 51-52.
Gordon vs. United States, 117 U. S., 697.
In Re Sanborn's Case, 148 U. S., 228.
The La Abra Mining Co. vs. United States, 175 U. S., 457.

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